

Common Ground[™] Technology Contract Protocols

Sensible contracts, quickly[™]

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Definitions - General

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Affiliate

(a) Affiliate status exists (i) when one individual or organization is in a *control relationship* with another, and/or (ii) in any other circumstance expressly stated by this Agreement. (b) The following are also affiliate relationships: **None**.

102. And/or

And/or means the inclusive or. **EXAMPLE:** “The parties expect to meet each Tuesday and/or Wednesday” means that they expect to meet Tuesday, Wednesday, or both.

103. Best efforts

(a) *Best efforts* refers to ‘leaving no stone unturned’ in making *reasonable efforts* to achieve the stated objective. (b) A party required to use *best efforts* (i) need not take every conceivable action to achieve the stated objective, and (ii) need not take any action that would not qualify as a *reasonable effort*.

104. Business discretion

IF: This Agreement commits a decision, determination, or action to a person's *business discretion*; THEN: That decision, determination, or action may be taken in the person's sole and unfettered discretion, with a mind solely to the person's own wishes and not those of any other person, and without reference to any putative standard of reasonableness, good faith, or fair dealing.

105. Commercially reasonable efforts

Commercially reasonable efforts refers to at least those efforts that experienced business people, in the relevant circumstances, would regard as *reasonable efforts*.

106. Control; control relationship

(a) For purposes of determining *affiliate* status, *control* of an organization (whether or not the term is capitalized) refers to the direct or indirect possession of (i) voting control of securities of the organization carrying **at least 50%** of the aggregate right to vote for the organization's board of directors or comparable governing body, or (ii) the right to select, or to prevent the selection, of a majority of the members of such board or other body. (b) A *control relationship* exists between two persons (where a person is an individual or an organization) when one such person *controls*, is

controlled by, or is under common control with, the other person, either directly or indirectly via one or more intermediaries.

107. Customer

Customer refers to a party acquiring goods or services from another party (see also *provider*).

108. Examples

Examples (and terms such as for example) and include and similar terms (e.g., including), whether or not capitalized, are used in this Agreement for purposes of illustration, not of limitation, unless another meaning is clear from the context.

109. For the avoidance of doubt

For the avoidance of doubt, IF: The parties omit from this Agreement a form clause containing the term “for the avoidance of doubt” (or similar phrases such as “for clarity”); THEN: That omission does not in itself signify that the parties agreed to a proposition contrary to the omitted form clause.

110. Include, etc. — see Examples.

111. Indemnify

(a) IF: A provision of this Agreement obligates a party to indemnify another individual or organization against a third-party claim or other event but is not specific as to the types of harm to be indemnified; THEN: The obligated party will indemnify the individual or organization against all claims, liabilities, losses, damages, obligations, penalties, actions, judgments, execution, costs, expenses (see below), and disbursements, of any kind or nature, arising out of the specified event(s). (b) For purposes of subdivision(a), *expenses* includes, for example, reasonable attorneys' fees, expert witness fees, and other expenses of litigation or arbitration. (c) An obligation to indemnify against a claim **includes** the obligation to provide a defense against the claim, whether or not the defense obligation is stated.

112. Law

Law refers to any and all applicable provisions of a constitution, statute, regulation, ordinance, judgment, order, or other requirement or prohibition having legally-binding effect.

113. Protected party; protected person

(a) *Protected party* refers to: (i) in connection with a third-party claim, a signatory party that is entitled to indemnity and/or defense by another signatory party; (ii) in connection with a limitation of remedies or other liability, the signatory party whose liability is so limited. (b) *Protected person* refers to (i) a *protected party* itself and (ii) the protected party's em-

ployees, officers, directors, shareholders, general- and limited partners, members, and managers.

114. Provider

Provider refers to a party providing goods or services to another party (see also *customer*).

115. Reasonable efforts

(a) *Reasonable efforts*, whether or not capitalized, refers to one or more reasonable actions reasonably calculated to achieve the stated objective. (b) Any assessment of *reasonable efforts* shall give due regard to the information reasonably available at the relevant time about, for example, (i) the likelihood of success of specific action(s); (ii) the likely cost of other actions; (iii) the parties' other interests, (iv) the safety of individuals and property, and (v) the public interest. (c) For the avoidance of doubt, *reasonable efforts* does not necessarily require taking every conceivable reasonable action.

116. Seasonably

An action is taken seasonably (whether or not the word is capitalized) if the action is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

117. Specified; stated

Terms such as “as specified” or “as stated” refer to the information stated (i) in the heading or body of the relevant provision, or (ii) in a provision of the body of this Agreement, unless otherwise clear from the context.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

One or more of the following opt-in definitions can be included in this Agreement by using language such as, “*The Common Ground Protocol definitions for the following opt-in terms are incorporated: CPI.*”

201. CPI

Consumer Price Index and *CPI* refer to the Consumer Price Index, All Items for All Urban Consumers (CPI-U) published by the U.S. Bureau of Labor Statistics.

— END OF PAGE —

3. Notes

Introductory comment: There are three schools of thought about defined terms: 1) Put all defined terms in a Definitions section; 2) Define each term as it is first used; and 3) A combination of 1 and 2. I've adopted the third approach.

Notes for § 101 Affiliate

Why is this provision included? Sometimes when a company negotiates a contract, it wants the benefits (or obligations) of the contract to extend also to other companies with which the first company considers itself (or the other side) to be “affiliated.” This definition puts fences around the concept of affiliation.

Should I object? This definition is very common and seldom objected to. It's based on definitions used in a number of SEC regulations (see the commentary in the definition of *control* below).

Other affiliate relationships – subdivision (b): This provision can be useful in the situation in which, let's say, Company A is a partner in a joint venture, and doesn't have a control relationship with the joint venture, but it still wants the joint venture to have affiliate benefits under the agreement.

Suggestion: Think about what would happen if one of the other side's existing- or future *affiliates* turned out to be one of your competitors, or some other person or organization you'd just as soon not do business with.

Suggestion: It might be well to specify, elsewhere in the Agreement, just what would happen in case of loss of *affiliate* status. For example, suppose that (1) that a software license agreement permitted the licensee's *affiliate* to use the software, and (2) that a particular *affiliate* were later to lose its status as such because of a corporate divestiture. It could be disruptive if the *affiliate* were required immediately to stop using the licensed software.

Notes for § 102 And/or

Comment: Some critics rail against the use of *and/or* as a crutch for the lazy. According to one judge — no slave to brevity, he — “the drafter could express a series of items as, ‘A, B, C, and D together, or any combination together,

or, or any one of them alone.’”¹ Um, sure, Your Honor

I'm usually a stickler for ‘correct’ language. But count me in the camp of those who insist that *and/or* is a perfectly serviceable shorthand. Language was made for man, not man for language.²

Notes for § 103 Best efforts

Why is this provision included? This section attempts to give some predictability to the term “best efforts.” Different courts might define the term in very different ways — sometimes requiring all efforts short of bankruptcy, while other times requiring only reasonable efforts. **Should I object?** Very few contracts try to define “best efforts,” so it's not clear how acceptable this definition will be in the market. The “leaving no stone unturned” phrase is from a Canadian court decision, *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, 89 B.C.L.R. (2d) 356 (1994), excerpted by Ken Adams at <http://bit.ly/8AdIXf>.

See also: • The definition of *reasonable efforts*; • a useful 2007 [Jones Day memo](#) by Shawn C. Helms, David Harding, and John R. Phillips at <http://bit.ly/4noETJ>; • a blog posting by Ken Adams and the extensive comments following it (including my own comments): [What the Heck Does “Best Efforts” Mean?](#), Jan. 23, 2008 (accessed Apr. 1, 2009).

Notes for § 104 Business discretion

PURPOSE: This section offers a less-harsh substitute for the traditional phrase “sole and unfettered discretion.” (It says more or less the same thing, but in a way that should be less disconcerting to the other side.) This definition is also intended to deter attacks in litigation by ‘creative’ lawyers, claiming that the other side had some sort of *implied* duty to exercise its discretion in a particular way.

Should I object? The definition itself shouldn't be contentious. But negotiators

¹ Carley Foundry, Inc. v. CBIZ BVKT, LLC, No. 62-CV-08-9791, slip op. at 8 (Minn. Ct. App., Apr. 6, 2010); (affirming summary judgment dismissing malpractice claim on grounds of prior release) (unpublished) (italics added); see also, e.g., materials cited in the [Wikipedia entry](#) for the term “and/or.”

² Ken Adams rightly [warns](#) on his contract-drafting blog, as does UT Law's legal-writing professor [Wayne Scheiss](#) in a comment there, against using *and/or* in contexts where it's substantively wrong.

might disagree about whether a party should be allowed to exercise its unfettered discretion in a particular situation.

NOTE: A party exercising *business discretion* can do pretty much anything it wants in that exercise, as long as it's legal, of course. This contrasts with the abuse of discretion standard that restricts what lower-court judges can do when they have discretion.

Notes for § 105 Commercially reasonable efforts

Why is this provision included? To provide guidance for interpreting this commonly-used term.

Comment: Note that this definition expressly requires assessing the level of effort from the point of view of reasonably-experienced business people. Note also, however, that the definition implicitly incorporates the definition of *reasonable efforts*, which potentially requires consideration of more than just business issues.

Notes for § 106 Control; control relationship

Why is this provision included? See the discussion in the definition of *Affiliate*. **Should I object?** The 50% language is common, as is the definition of *control*, which has roots in the definition of *affiliate* in U.S. securities laws such as [Rule 501\(b\)](#) of SEC Regulation D, 17 CFR § 230.501(b).

NOTE: Some parties may want the percentage to be less than 50% because they have subsidiaries in which they don't own that much stock. Consider instead using [section Error! Reference source not found.](#) to specify that particular organizations are to be deemed *affiliates* even without a *control relationship*.

Notes for § 107 Customer

Why is this provision included? To simplify some of the language in various Protocols and Option Books.

Notes for § 108 Examples

Why is this provision included? This definition eliminates the need to repeatedly write (and read), for example, “by way of example but not of limitation.” It's not uncommon in contracts, and generally uncontroversial.

Notes for § 109 For the avoidance of doubt

Background: (1) Suppose that, in a nondisclosure agreement (NDA) negotiation, the disclosing party requested a clause stating that only its confidential information was protected by the NDA. (2) But suppose also that the receiving party refused to agree to that clause, whereupon the disclosing party dropped its request. (3) The receiving party might later try to argue that this negotiation history — the disclosing party proposing a provision, but the receiving party rejecting the proposal — meant that the parties had implicitly agreed to the contrary, that is to say, that they had agreed that the receiving party's confidential information, not just that of the disclosing party, was protected by the NDA. (4) This kind of problem could arise if a contract form contained such a “for the avoidance of doubt” provision, but then the parties omitted that provision from their actual contract. Conceivably, a party might later try to argue that, by omitting that provision, the parties had implicitly agreed to the opposite of the provision.

Why is this provision included? This provision is intended to forestall a party from making an argument along the lines summarized above.

Comment: Computer programmers will appreciate the provision's recursive use (not circular use) of the term “for the avoidance of doubt” itself.

Notes for § 110 Include, etc. — see Examples.

Notes for § 111 Indemnify³

Why is this provision included? This section eliminates the need to repeatedly write (and read), the laundry list of things to be defended- and indemnified against.

Should I object? Many indemnity clauses include laundry lists of This nature.

Note: This definition expressly requires the indemnifying party to *defend* against claims. Some courts have held that this obligation is implicitly part of an indemnity obligation; this language makes the obligation explicit.

Note: This definition does NOT include a “hold harmless” clause, in which the indemnifying party, in essence, not only (i) agrees to reimburse the protected party for whatever damage it might incur itself, but also (ii) gives the protected party a get-out-of-jail-free card, that is, the indemnifying party agrees to be responsible for all of the damage in question even if the protected party bears some responsibility for it.

Notes for § 112 Law

Why is this provision included? Once in a great while, an aggressive trial counsel might try to claim that some form of government requirement did not constitute “law” in connection with a contract provision.

Notes for § 113 Protected party; protected person

Why is this provision included? This definition helps reduce the verbosity of indemnity provisions.

Notes for § 114 Provider

Why is this provision included? To simplify some of the language in various Protocols and opt-in provisions.

Notes for § 115 Reasonable efforts

Why is this provision included? This section attempts to give some predictability to the term “reasonable efforts.”

Should I object? This definition is my own coinage. Whether a given drafter or reviewer will want to use it will likely depend on the specific context in which the defined term is to be used.

Comment: Chapter 7 of Ken Adams's *A Manual of Style for Contract Drafting*, 2d Ed., contains useful research. See also a helpful *2007 Jones Day memo* by Shawn C. Helms, David Harding, and John R. Phillips at <http://bit.ly/4noETJ>.

Notes for § 116 Seasonably

Comment: This definition is reproduced verbatim from *UCC § 1-205*.

Notes for § 117 Specified; stated

Notes for § 201 CPI

Why is this included? Many contracts include limitations on pricing increases, often tied to increases in CPI.

Should I object? Depending on the industry, CPI-U might not be the best index for estimating how much a provider's costs have increased. As explained in the [FAQ page](#) of the Bureau of Labor Statistics (accessed Dec. 2, 2010):

The CPI measures inflation as experienced by consumers in their day-to-day living expenses; the Producer Price Index (PPI) measures inflation at earlier stages of the production process; the Employment Cost Index (ECI) measures it in the labor market; the BLS International Price Program measures it for imports and exports; and the Gross Domestic Product Deflator (GDP Deflator) measures inflation experienced by both consumers themselves as well as governments and other institutions providing goods and services to consumers. Finally, there are specialized measures, such as measures of interest rates.

³ For a very understandable introduction to indemnities, see *The Manager's Guide to Understanding Indemnity Clauses*, by attorney Frank Adoranti — a Google Books preview is at <http://bit.ly/Indemnity>.

Arbitration

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Agreement to arbitrate

All disputes arising out of or relating to this Agreement or any transaction or relationship resulting from it — including without limitation all claims for any form of equitable or declaratory relief and/or any form of monetary awards, arising under a constitution, statute, ordinance, regulation, or common law — will be settled by binding arbitration in the English language under the U.S. Federal Arbitration Act and this Agreement.

102. Disputes about arbitrability

Any dispute about arbitrability and/or the validity or enforceability of the parties' agreement to arbitrate is to be decided by the arbitral tribunal.

103. Arbitration administrator

The arbitration will be administered by the American Arbitration Association.

104. Arbitration rules

To the extent not inconsistent with this Agreement, any arbitration pursuant to this Agreement will be governed by the AAA Commercial Arbitration Rules (the arbitration rules).

105. Arbitral tribunal

Any arbitration pursuant to this Agreement will be conducted before a single arbitrator appointed in accordance with the arbitration rules (the arbitral tribunal).

106. Place of arbitration

The place of the arbitration will be as determined by the body promulgating the arbitration rules if not otherwise agreed.

107. Streamlining of

arbitration proceedings

(a) The arbitral tribunal is authorized and directed to streamline the arbitration proceedings to the extent reasonably possible, including for example, where appropriate, (1) dividing the proceeding into separate phases to address selected issues, and/or (2) directing that opposing

expert witnesses present a joint report explaining their points of agreement and disagreement, and/or (3) directing that opposing expert testimony be presented concurrently, sometimes nicknamed “hot tubbing” or “dueling experts.” (b) For the avoidance of doubt, the parties, by agreement, may overrule any procedural decision of the arbitral tribunal. (c) In the interest of reducing inefficiencies and the attendant extra expense, the arbitration hearing shall be conducted on consecutive days unless the arbitral tribunal directs otherwise for good reason.

108. Forum for enforcement

(a) The arbitral tribunal's award may be enforced in any court having jurisdiction. (b) IF: A particular forum is specified for enforcement of the award; THEN: Each party hereby submits to the jurisdiction (non-exclusive unless otherwise specified) of that forum solely for that purpose, without prejudice to any other basis for jurisdiction there.

109. Survival of arbitration provisions

The arbitration provisions of this Agreement will survive any termination or expiration of the Agreement in respect of any arbitrable matter arising from or relating to this Agreement.

110. WAIVER OF JURY TRIAL FOR ARBITRABLE DISPUTES

Each party acknowledges that, by agreeing to arbitrate the disputes specified above, **IT IS WAIVING ITS RIGHT TO TRIAL BY JURY OF SUCH DISPUTES** (if any).

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Confidentiality of arbitration proceedings

[Opt-in language: “Confidentiality of arbitration proceedings is required.”] Each party will (i) maintain in confidence the arbitration proceedings and any non-public information revealed therein by the other party; (ii) not use any such informa-

tion except for purposes of the proceedings; and (ii) disclose the proceedings and any such non-public information only to the minimum extent required: (x) for the conduct of the proceedings, on a need-to-know basis and in confidence, to the party's officers, directors, employees attorneys, consultants, expert- and fact witnesses, insurers, and agents; (y) by applicable law; and/or (z) for judicial enforcement of the arbitration tribunal's award.

202. No amiable compositeur or ex aequo et bono

[Opt-in language: Use the heading of this section.] The parties do not authorize the arbitral tribunal to act as amiable compositeur or ex aequo et bono; all arbitration awards must be in accord with the terms and conditions of this Agreement (including for example any limitations of liability) and the law governing this Agreement that would apply in a court of competent jurisdiction (including for example statutes of limitation or of repose).

203. Reasoned award

[Opt-in language: Copy and paste the entire provision.] The arbitral tribunal shall include in its award an explanation of its reasoning.

204. Enhanced judicial review

[Opt-in language: “Enhanced judicial review is agreed to.”] (a) The arbitral tribunal's powers do not include the power to render an award: (i) based on errors of law or of legal reasoning, nor (ii) based on evidence that would not satisfy the requirements of law for and in a trial to the court without a jury. (b) The parties agree that any award that is so based, in whole or in part, may be vacated by a court of competent jurisdiction on grounds that the arbitral tribunal exceeded his, her, or their agreed powers.

— END OF PAGE —

3. Notes¹

Notes for § 101 Agreement to arbitrate

Why is this provision included? Arbitration is a creature of contract; without an express agreement to arbitrate, either in the contract itself or after a dispute arose, the dispute would go to court.²

ALERT: Drafters of consumer contracts should check the latest developments in the law governing consumer-arbitration provisions.

Arising out of, etc.: The broad language in this provision is adapted from an arbitration clause upheld by the Fifth and Eleventh Circuits.

Arising out of, etc.: The broad language in this provision is adapted from an arbitration clause upheld by the Fifth and Eleventh Circuits.³ Other conventional possibilities include, for example: • “arising out of this Agreement” (a classic, relatively-narrow formulation) • “arising out of or relating to this Agreement” (another classic, but broader, phrasing). ¶ A drafter could also include targeted examples of some of the specific types of claim that might arise. ¶ Consider also “all claims, of whatever nature, that may arise between the parties before termination of this Agreement,” based on a somewhat-similar provision enforced by the Eighth Circuit.⁴

Narrower arbitration possibilities? If the parties don’t want to agree to arbitrate *all* disputes between them, they could consider: • “any dispute whether an express reasonableness standard in this Agreement has been met, for example, in a provision (if any) stating

that a specified action must be taken with a reasonable time” — I don’t believe I’ve ever seen a clause like this in an actual contract, but a quick, streamlined decision about, say, “reasonable efforts” might obviate the need for other judicial- or arbitration proceedings; • “any dispute about reasonableness” — ditto; • “the amount of any monetary award in any dispute, in any forum, arising out of or relating to this Agreement or any transaction or relationship resulting from it” — ditto.

Which arbitration law governs? If an agreement to arbitrate is in fact **subject to the Federal Arbitration Act**, then state laws requiring in-state arbitration, conspicuous notice of arbitration requirement, etc., might well be preempted by the Act.⁵

Special constraints: Drafters of contracts in the financial-services arena should check the Dodd-Frank Act’s restrictions on arbitration.⁶ • Government contractors and subcontractors should check the Franken Amendment’s restrictions on arbitration clauses in employment agreements.⁷

Do companies actually use arbitration clauses? The authors of a 2007 study said that: “... less than ten percent of their negotiated non-consumer, non-employment contracts included arbitration clauses. The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers.”⁸

Comment: Arbitration used to be regarded as faster and less expensive than litigation. In recent years, however, what some have called the increasing “litigationization” of some arbi-

tration proceedings has made that a questionable proposition.⁹

Notes for § 102 Disputes about arbitrability

Why is this provision included? In its 2010 *Rent-a-Center* opinion, the Supreme Court held that — in cases governed by the **Federal Arbitration Act** — if the parties “clear[ly] and unmis-takabl[y]” agree that such ‘gateway’ disputes are to be decided by the arbitral tribunal, then courts must give effect to that agreement.¹⁰ (Otherwise, presumably such disputes would be decided by a court.) At least when negotiating the agreement, parties that want to arbitrate will probably want any disputes about the enforceability of the agreement to arbitrate to be decided by the arbitral tribunal, without the extra cost and burden of submitting such a dispute to a court. (But of course one or another party might change its mind if an actual contract claim were to arise.)

Alternative wording: “... will be decided by a court of competent jurisdiction.”

Notes for § 103 Arbitration administrator

Why is this provision included? Parties could specify one set of rules to govern an arbitration, for example the ICC or UNCITRAL rules, but also specify that, say the American Arbitration Association would administer the arbitration.

What if it were left out? **Rule R-2** of the AAA Commercial Arbitration Rules provides that the AAA will administer the arbitration, for a fee of course; ditto (by implication) **Article 4** and **Appendix III** of the ICC Rules, along with various other rules. NOTE: A New York appellate court ruled in 2010 that mere reference to a set of arbitration rules does not equal an agreement by the parties that the sponsor of the rules will administer the arbitration; it characterized the reference to the rules as a choice of law and not a choice of forum.¹¹ ¶ On the other hand, a

¹ Further reading: See generally the **arbitration-clause checklist** by my late partner, mentor, and friend, the legendary intellectual-property lawyer **Tom Arnold**.

² See *United Steel Workers of Am. v. American Mfg. Co.*, 363 U.S. 564, 569-70 (1960) (Brennan, J., concurring) (courts must always determine whether party opposing arbitration has in fact agreed to arbitrate the particular dispute).

³ See *Sherer v. Green Tree Servicing LLC*, No. 07-60567 (5th Cir. Nov. 10, 2008), citing *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1310 (11th Cir. 2005).

⁴ See *Indus. Wire Prod’s, Inc., v. Costco Wholesale Corp.*, No. 08-3189, slip op. at 2, 8-9 (8th Cir. Aug. 6, 2009) (reversing denial of motion to compel arbitration of patent-infringement claim by manufacturer against retailer that carried its products).

⁵ See, e.g., *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (reversing, on preemption grounds, Montana Supreme Court ruling that arbitration clause was unenforceable for failing to comply with a Montana statute that required contracts to contain a specific notice on the first page if they contained arbitration provisions).

⁶ See generally **Karl Bayer’s summary** (accessed Sept. 28, 2010).

⁷ Summarized in this **Nixon Peabody posting** (accessed Sept. 28, 2010).

⁸ Theodore Eisenberg, Geoffrey P. Miller, & Emily L. Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Non-consumer Contracts*, Cornell Law School Legal Studies **Research Paper No. 08-017**, at 6, Dec. 18, 2007, discussed in Jonathan D. Glater, *Companies Unlikely to Use Arbitration With Each Other*, **New York Times**, Oct. 6, 2008, each accessed Oct. 6, 2008.

⁹ See generally Anthony C. Valiulis and Cassandra M. Crane, *Winning the Battle to Arbitrate: Was the Victory Real or Pyrrhic?* (accessed Sept. 23, 2009).

¹⁰ *Rent-a-Center, West, Inc., v. Jackson*, 561 U.S. ___, No. 09-497 (June 21, 2010) (reversing Ninth Circuit and approving district-court order compelling arbitration of employment dispute).

¹¹ See *Nachmani v. By Design, LLC*, 2010 NY Slip Op 04847 [74 AD3d 478] (June 8, 2010) (affirming order compelling arbitration not administered by AAA and

California appeals court ruled in 2000 that an arbitration agreement adopting the AAA rules must be conducted before the AAA and not before another body that agreed to follow the AAA rules.¹²

Other administrators: Other possible administrators for an arbitration include, for example, • [JAMS](#) (formerly Judicial Arbitration and Mediation Services, Inc.); • the [International Court of Arbitration](#) of the International Chamber of Commerce (ICC); • the [London Court of International Arbitration](#); the [Chinese European Arbitration Centre](#); • the [Hong Kong International Arbitration Centre](#); • the World Intellectual Property Organization (WIPO) [Arbitration and Mediation Center](#); and • various industry-specific organizations such as the [Financial Institution Regulatory Authority](#) (FINRA).

What about self-administered arbitration? In theory, self-administered (“ad-hoc”) arbitration might be less expensive. In practice, though, the savings likely would be offset by the arbitrators’ billings for administrative work. Moreover, if a procedural dispute were to arise, having a neutral institution available to resolve the dispute would often be well worth the administration fee. (Disclosure: My views on this subject are influenced by those of my wife, a long-time labor arbitrator.) ¶ If the parties did decide to go with ad-hoc arbitration, they could elect to use the [CPR Rules for Non-Administered Arbitration](#).

Notes for § 104 Arbitration rules

Which arbitration rules to choose? The [AAA Commercial Arbitration Rules](#) seem to be a typical “default” standard. The AAA also has expedited rules that can be used if desired. ¶ Some believe that the [ICC arbitration rules](#) of the International Chamber of Commerce are among the most popular world-wide. ¶ Still others view the [UNCITRAL rules](#) as holding that position. (This article compares the latter two.) ¶ Then there are the [rules](#) and the [expedited rules](#) of the World Intellectual Property Organization (WIPO). ¶ The [JAMS Streamlined Arbitration Rules](#) have been praised by

staying arbitration that was to be administered by AAA).

¹² See [Maggio v. Windward Capital Management Co.](#), 80 Cal. App. 4th 1210 (2000) (reversing district-court order directing arbitration before other body, and ordering entry of a new order directing arbitration before AAA).

some arbitrators as effective. ¶ The [CPR Rules](#) are favored by some.

Notes for § 105 Arbitral tribunal

Why is this provision included? According to some experienced practitioners, the cost and inconvenience of three arbitrators is likely to be *more* than three times the cost of a single arbitrator: Three arbitrators will need extra time for conference calls, reviewing and commenting on drafts, etc. (also scheduling can be more difficult).

What if it were left out? Chances are that the arbitration rules would specify whether to use one arbitrator or three.

Arbitrator qualifications? A drafter could specify the kind of qualifications desired in an arbitrator, for example, “at least ten years of practicing law, with substantial experience in [a specified industry], and preferably with substantial first-hand experience in litigation.”

Notes for § 106 Place of arbitration

Why is this provision included? The parties might want to specify the place of arbitration (sometimes called the “seat” of the arbitration), because it could have significant implications for the governing law and the enforceability of any eventual award — especially if the place of arbitration is not a signatory to the [New York Convention](#).

What if it were left out? It might well be unnecessary for the parties to try to agree in advance on a place of arbitration, because arbitration rules typically include provisions for determining the place of arbitration if the parties are unable to agree otherwise.¹³

Notes for § 107 Streamlining of arbitration proceedings

Should I ask for this? Arbitrations can sometimes get bogged down in litigation-like proceedings; this provision expressly encourages

the arbitral tribunal to streamline the proceedings where possible.

What if it were left out? Arbitration rules usually give the arbitral tribunal at least some authority to manage the proceedings anyway, so omission of this provision might not be disastrous. Some arbitrators, however, can be reluctant to exercise that authority, in part because they’re afraid of angering one side or another (or its lawyer), on the theory that doing so might jeopardize their chances of getting future business from that party (or from that lawyer).

Consecutive-day hearings – subdivision (1):

The late intellectual-property litigator and arbitrator [Tom Arnold](#) suggested requiring arbitration hearings to be conducted on consecutive days. Litigators can confirm that cases take longer (and cost more) when the tribunal doles out its time a few hours here and a few there. Of course, the parties can agree otherwise in a particular case.

Phased hearing – subdivision (2): A judicial analogy would be the bifurcation of a trial into liability- and damages phases.

“Hot tubbing the experts” — subdivisions (3) and (4): Some Australian courts have pioneered the notion of making opposing expert witnesses confer with each other, prepare joint reports, and testify by conversation. The idea is attracting interest in U.S. arbitration circles.¹⁴

Notes for § 108 Forum for enforcement

Why is this provision included? To remind the parties to consider specifying a particular court for award enforcement. (Under [section 9](#) of the Federal Arbitration Act, an arbitration award may be enforced in any court specified in the agreement.)

¹³ See, e.g., [AAA Rule R10](#) (a party’s proposed place will be used if other party does not object, otherwise AAA will conclusively determine the place); [ICC Rules Article 14](#) (ICC will determine place unless parties agree otherwise); [UNCITRAL Rules Article 16](#) (ditto). For a review of some pros and cons of choosing London as the seat of international arbitration, as opposed to New York, Singapore, or Bermuda, see [this 2008 interview](#) with two lawyers in Weil Gotshal’s London office, in *The Metropolitan Corporate Counsel* (accessed Oct. 13, 2008).

¹⁴ See, e.g.: • Steven Ranes, [Expert Evidence in Copyright Cases – Concurrent Expert Evidence and the “Hot Tub”](#) (Oct. 15, 2009) (accessed Sept. 14, 2010); • Gary Edmond, [Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure](#), 72 LAW & CONTEMP. PROBL. 159 (Winter 2009) (accessed Sept. 14, 2010); • [New South Wales] Uniform Civil Procedure Rules 2005, Reg. 31.23 (expert witness code of conduct); 31.24 (conference between expert witnesses); 31.26 (joint report of expert witnesses); 31.35 (opinion evidence by expert witnesses); • [Expert witness code of conduct](#), Schedule 7 to [New South Wales] Uniform Civil Procedure Rules 2005.

What if it were left out? Under [section 9](#) of the Act, if no court is specified in the parties' agreement, an arbitration award may be enforced in the district court where the award was made.

Enforcement in non-U.S. jurisdictions: When a non-U.S. person is involved, it may be easier to seek enforcement of an arbitration award in the person's home country under the [New York Convention](#) (assuming that country is a member of the Convention) than to try to enforce a U.S. court's judgment in that country.

Enforcement in a specific forum – subdivision (b): A party with bargaining power might want the other party to agree to the jurisdiction of the first party's home court for enforcement of an arbitration award. (Of course, if the other party doesn't have any attachable assets in the selected forum, an attempt to enforce the award there might be a fool's errand.) On the other hand, the selected forum might be inconvenient (and thus expensive) for the other party.

Enforcement by third parties: In May 2009 the U.S. Supreme Court held that, as long as state law permits a third party to enforce the arbitration requirement, doing so is permissible under the Federal Arbitration Act.¹⁵

Notes for § 109 Survival of arbitration provisions

Why is this provision included? To avoid having a party, in a dispute concerning a since-terminated or -expired contract, argue that the obligation to arbitrate expired with the contract.

What if it were left out? It seems unlikely, but a party that had second thoughts about arbitrating a dispute might try to argue that the arbitration agreement died with the agreement itself.

Notes for § 110 WAIVER OF JURY TRIAL for arbitrable disputes

Should I ask for this? The law in some jurisdictions may require conspicuous notice of a jury-trial waiver.

What if it were left out? Such a state-law notice requirement might be preempted by the Federal Arbitration Act if that Act applied.¹⁶

Notes for § 201 Confidentiality of arbitration proceedings

Why is this provision included? One of the reasons parties opt to arbitrate their disputes is to try to avoid having their business affairs made public in court proceedings.

What if it were left out? Arbitration proceedings might not be confidential unless the parties expressly so agreed. A survey of some relevant holdings in various countries, and of various arbitration rules that do or do not contain confidentiality provisions, can be found in a 2007 article.¹⁷

Notes for § 202 No amiable compositeur or ex aequo et bono

Should I ask for this? An arbitrator acting as *amiable compositeur* or *ex aequo et bono* may set aside what might be called 'technical considerations' of the law, and instead may issue an award she deems just.

What if it were left out? In many jurisdictions, an arbitrator is not permitted to act as *amiable compositeur* or *ex aequo et bono* unless expressly so authorized by the arbitration agreement.¹⁸ ¶ On the other hand, different arbitration rules have different provisions about the arbitrator's power to act as *amiable compositeur* or *ex aequo et bono*.¹⁹

Limitations of liability: Some drafters might include a laundry list of all the types of damages the arbitral tribunal is NOT allowed to award, to remind the arbitrator that he (or she) does *not* have unfettered power to dis-

pense justice and equity as he sees fit. ¶ An example of an arbitration clause from the construction industry that includes numerous remedies that the arbitrator can be found in a 2002 article.²⁰

Statutes of limitation: In July 2010, the Washington Supreme Court held that a statute-of-limitations defense does not apply in arbitration proceedings.²¹

Notes for § 203 Reasoned award

Should I ask for this? Losing parties in an arbitration usually want at least some explanation of why they lost, and some arbitration rules require such an explanation.²² On the other hand, some parties might *not* want a reasoned award, on grounds that (i) reasoned awards cost more in arbitrators' fees and in waiting time, and (ii) reasoned awards might contain confidential information, which likely would become public if an award were to be appealed to a court. ¶ Moreover, *winning* parties often feel that, the less verbiage there is in an award, the less vulnerable the award would be to being vacated by a reviewing court.

What if it were left out? Arbitration awards typically contain at least some explanation of the underlying reasoning, in part to build confidence both in the arbitration process and in the arbitrator (who usually wants to be hired again someday).

Notes for § 204 Enhanced judicial review

Should I ask for this? A party concerned that an arbitrator could mess up an important decision might want the right to seek judicial review of the award. **Should I object?** Judicial review of an arbitration award would delay final resolution of the dispute and would add another layer of expense and drain on management attention. Moreover, **this provision**

¹⁶ See note 5.

¹⁷ See Claude R. Thomson & Annie M. K. Finn, [Confidentiality in Arbitration](#) ..., DISPUTE RESOLUTION JOURNAL, May-Jul 2007.

¹⁸ See, e.g., the respective articles on "Ex aequo et bono" by McGill University and Wikipedia (each accessed Sept. 15, 2010).

¹⁹ For example, [Rule 43](#) of the AAA's [Commercial Arbitration Rules](#) authorizes the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties" In contrast, [Article 17.3](#) of the ICC Rules of Arbitration require agreement of the parties as a prerequisite to the arbitrator's deciding as *amiable compositeur* or *ex aequo et bono*; ditto [Article 33.2](#) of the UNCITRAL Arbitration Rules and [Article 59\(a\)](#) of the WIPO Arbitration Rules.

²⁰ See Charles M. Sink, [Negotiating Dispute Clauses That Affect Damage Recovery in Arbitration](#), THE CONSTRUCTION LAWYER, vol. 22, no. 3, summer 2002 (accessed Sept. 28, 2010).

²¹ See [Broom v. Morgan Stanley DW Inc.](#), No. 82311-1, slip op. at 10-17 (Wash. Jul. 22, 2010) (en banc: affirming vacation of arbitration award that most of investors' claims against brokerage firm were barred by limitations).

²² [Rule 39\(c\)](#) of the AAA Employment Arbitration and Mediation Rules requires the award to "provide the written reasons for the award unless the parties agree otherwise."

¹⁵ [Arthur Andersen LLP v. Carlisle](#), No. 08-146 (U.S. May 9, 2009) (reversing and remanding appellate court affirmance of denial of stay).

might not be enforceable in arbitration proceedings governed by the Federal Arbitration Act: In March 2008, the U.S. Supreme Court ruled that, when the sole authority for arbitration is the FAA, the parties cannot agree to judicial review of an arbitration award except on the limited grounds listed in [section 10](#) of the Act — a list not including errors of law or fact.²³ ¶ The Supreme Court, however, left open the possibility that enhanced review might be available under some other authority, such as state law or (in the case of court-annexed arbitrations) a court's inherent power to manage its docket. Later in 2008, the California Supreme Court accepted the Court's invitation: It ruled that, under the California Arbitration Act, the parties to an arbitration agreement can indeed agree to enhanced review.²⁴

Limited review of findings of fact - subdivision (a)(ii): This language limits review of the arbitral tribunal's findings of fact, on grounds that the arbitral tribunal's expertise in the subject matter is likely to be greater than that of a "random" judge.

²³ See [Hall Street Assoc. v. Mattel, Inc.](#), 552 U.S. 576 (2008).

²⁴ See [Cable Connection, Inc. v. DIRECTV, Inc.](#), 44 Cal.4th 1334, 82 Cal. Rptr.3d 229, 190 P.3d 586 (Cal. Aug. 25, 2008) (reversing and remanding reversal of district court's vacating of arbitration award) (not available on-line except behind a putatively-restrictive LexisNexis user agreement).

Auditing of Records

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Audits – basic ground rules

(a) Audits will be conducted (1) during the recordkeeping party's normal business hours; (2) at reasonable times designated by the auditing party in consultation with the recordkeeping party; and (3) either (i) where the records are kept in the ordinary course of business, or (ii) in another reasonable location designated by the recordkeeping party in consultation with the auditing party. (b) The recordkeeping party will provide the auditing party with reasonable working space and reasonable access to relevant records and personnel; it will also direct its relevant personnel to provide the auditing party, upon request, with reasonable information about the records in question and the matters recorded therein.

102. Auditor retention of copies

For the avoidance of doubt, the auditor(s) may make and keep copies of the recordkeeping party's relevant records, PROVIDED THAT they: (1) preserve the copies and their contents in strict confidence; (2) do not use or disclose the copies or any non-public information contained therein except to the minimum extent necessary to perform the audit; (3) instruct their relevant employees and/or colleagues concerning the confidentiality obligations of this section; and (4) return or destroy the copies within a reasonable time after the expiration of any relevant record-retention period.

103. Confidentiality of audits

Absent consent of the recordkeeping party, the auditing party: (a) will not use nonpublic information of the recordkeeping party revealed by an audit except for purposes of protecting its rights and/or performing its obligations under this Agreement; (b) will not disclose any such information to third parties; and (c) will direct its auditor(s) to maintain the

recordkeeping party's information in strict confidence, including for example complying with the requirements of subdivisions (a) and (b) above.

104. Reconciliation of discrepancies

Any discrepancy revealed by the audit, in respect of amounts paid and/or amounts owed pursuant to this Agreement, will be paid by the relevant party together with interest on the same terms as for a late payment pursuant to this Agreement.

105. Audit expense shifting

(a) IF: (i) An audit reveals a disparity of at least **five percent** for a period being audited; AND (ii) the disparity favors the recordkeeping party, AND (iii) the disparity resulted from the recordkeeping party's error; THEN: The recordkeeping party will reimburse the auditing party for reasonable expenses actually incurred that were reasonably necessary in auditing that specific period. (b) The recordkeeping party will also reimburse reasonable audit expenses actually incurred if the audit reveals a material breach of this Agreement.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Recordkeeping requirements

[Opt-in language: Copy and paste the entire provision, editing as desired.] Provider will create and maintain, for at least **three years** or such longer time as may be required by law, complete and accurate records, conforming at a minimum to **generally accepted accounting principles** and any additional requirements imposed by law, for each transaction taking place under this Agreement.

202. Auditor qualifications

[Opt-in language: Copy and paste the entire provision, editing as desired.] Any audit must be conducted by one or more **independent certified public accountants reasonably acceptable to the recordkeeping party**.

203. Audit frequency- and coverage restrictions

[Opt-in language: Copy and paste the entire provision, editing as desired.] Except for good reason clearly shown: (a) Audits may be conducted no more than **once in any 12 consecutive months**. (b) The deadline for requesting an audit of records for a given period is **one year** after the end of that period. (c) Only **one** audit is permitted for records for a given period.

204. Auditor disclosures are restricted.

[Opt-in language: Same as this section's heading.] The auditor(s) may disclose to the auditing party only (i) whether a reportable discrepancy was found, and (ii) the size and general nature of the discrepancy.

205. Unrelated information need not be disclosed to the auditor(s).

[Opt-in language: Same as this section's heading.] For the avoidance of doubt, the recordkeeping party need not disclose unrelated information to the auditor(s); such unrelated information might include, for example, information concerning the recordkeeping party's other customers, clients, business associates, and/or business affairs.

— END OF PAGE —

3. Notes

Notes for § 101 Audits – basic ground rules

Why is this provision included? Customers often want audit provisions; the subdivisions of this section set out a variety of commonly-used terms and conditions for audits.

What if it were left out? A party wanting to audit its counterparty would be at the mercy of the other party's willingness to allow it.

Location of audit – subdivision (a)(3): If the parties' relationship is likely to be 'mutually suspicious,' it might be desirable for the audit provision instead to specify either (i) a particular location for the audit, or (ii) an agreed procedure for determining the location if the parties are unable to agree on one.

Notes for § 102 Auditor retention of copies

Should I ask for this? An auditing party's auditors might well find it burdensome (and therefore more expensive for the auditing party) to be precluded from making copies of the recordkeeping party's records. Indeed, outside auditors might insist on being able to take copies with them to file as part of their work papers.

What if it were left out? In theory, the recordkeeping party could take the position that the auditors must do all their work on-site and not take any documents with them. (This might be akin to the way that litigators dealing with classified government information sometimes must work exclusively in government classified-document vaults.)

Mini-NDA: This provision amounts to a non-disclosure agreement in miniature. For especially-sensitive matters, the parties might wish to negotiate a separate NDA for the auditor(s) to sign. (Licensed professionals such as CPAs and attorneys might decline to sign an NDA, on grounds that it's unneeded, given that they could lose their licenses if they were to violate their professional confidentiality obligations.)

ALERT: In some circumstances, the recordkeeping party might want to negotiate for limits on the types of records that the auditor(s) can copy and take away.

Notes for § 103 Confidentiality of audits

Why is this provision included? Auditors might well learn nonpublic information; the recordkeeping party doubtless would object to the information's being leaked or used without permission.

What if it were left out? A recordkeeping party might have no recourse for leaks or unauthorized use of information, other than perhaps for breach of the implied covenant of good faith and fair dealing, if that implied covenant were applicable.

Notes for § 104 Reconciliation of discrepancies

Why is this provision included? Mainly to reassure the auditing party that the recordkeeping party would "settle up" if the audit were to reveal a discrepancy.

What if it were left out? Presumably any discrepancies would be a breach of contract by the recordkeeping party, so technically the auditing party would have recourse for that breach even without this provisions.

Notes for § 105 Audit expense shifting

Why is this provision included? An auditing party will usually want the recordkeeping party to pay for the audit if the audit reveals a discrepancy greater than X — and it might be hard for a recordkeeping party to object convincingly (although the percentage-disparity threshold for expense-shifting might well be negotiable).

It's the economic incentives, stupid (with apologies to the Bill Clinton 1992 presidential campaign): Suppose the recordkeeping party were to be caught cheating. And suppose its only obligation was to pay what it should have paid in the first place. Clearly, the recordkeeping party would have an implicit economic incentive to cheat. (Of course, the recordkeeping party would risk losing the auditing party's trust, which could be an even bigger disincentive to cheating.)

Threshold: The disparity threshold for shifting the audit expense to the recordkeeping party often falls in the range between 3% and 7% to 10%.

Expense of auditing a specific period - subdivision (a): Suppose that: • the auditing party

conducted an audit of three years' worth of records (and the agreement did not preclude audits of records older than, say, one year); • the audit revealed a 10% discrepancy for a single year; no discrepancy was detected for any other year; and • spread out over the entire three-year period, the discrepancy revealed by the audit was 2.5%. In that situation, the recordkeeping party shouldn't have to foot the bill for the entire three-year audit. But neither should it escape the consequences of the 10% discrepancy in that one year. The language of subdivision (a) represents a compromise position.

Notes for § 201 Recordkeeping requirements

ALERT: All parties should try to anticipate the records they might later want for auditing purposes — and the recordkeeping party should think carefully about the burden it is undertaking.

Generally-accepted accounting principles: See generally the [Wikipedia entry](#) for GAAP, which includes useful links.

Notes for § 202 Auditor qualifications

Should I ask for this? A recordkeeping party might not want the auditing party's own personnel crawling around in the recordkeeping party's records, but would be OK with having an outside accountant (or other independent professional) do so. ¶ On the other hand, the auditing party might not want to bear the expense of having an outside auditor do the job, and might prefer instead to send in one of its own employees to "look at the books"

What if it were left out? The auditing party could have its own personnel do the auditing, which might disconcert the recordkeeping party, for example if the parties competed with each other.

Variation: Consider adding the following: "Any nationally-recognized firm of independent certified public accountants is acceptable except for good cause clearly shown." (The audit provisions in some contracts specify a Big Four accounting firm, but those firms can be pretty expensive.)

Reasonably acceptable: A recordkeeping party might want the ability to veto the auditing party's choice of auditors. An auditing party, however, might not trust the recordkeeping party

to be reasonable in choosing the auditor(s), and could be concerned that a dispute over reasonableness would be time-consuming and expensive.

Notes for § 203 Audit frequency- and coverage restrictions

Should I ask for this? Getting ready for an audit can be a hassle; the recordkeeping party might want to limit the frequency of such disruptions. The good-reason exception would give some protection to the auditing party, but that party might want to negotiate more flexibility to conduct repeat audits than the standard version of this provision allows.

What if it were left out? In theory, a recordkeeping party might find itself harassed with repeated audit demands at short intervals. (Genuine harassment, however, could put the auditing party at risk of being found to have breached an implied covenant of good faith and fair dealing.)

Notes for § 204 Auditor disclosures are restricted.

Should I ask for this? The recordkeeping party might be grudgingly willing to let the *auditor(s)* crawl around in its confidential business information, but it might not want the *auditing party* to get any more of that information than absolutely necessary. **Should I object?** An auditing party might be concerned about not knowing what it doesn't know, and that it might be harmed if the auditors must keep their mouths shut about something unexpected that doesn't fit into one of the categories of this section.

Notes for § 205 Unrelated information need not be disclosed to the auditor(s).

Should I ask for this? A recordkeeping party might want a provision like this as a comfort measure. **Should I object?** This provision might be contentious; the auditing party might respond, "We can't possibly know in advance what might constitute 'unrelated' information."

Breach and Termination

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Breach cure periods

A breaching party has the time periods stated below to cure a breach of this Agreement, each beginning upon the effective date of the non-breaching party's notice of breach: *Nonpayment of an amount due:* 5 business days. *Failure to meet an agreed deadline:* 1 business day. *Other curable breaches:* 10 days. *Noncurable breaches:* No cure period.

102. Termination for breach

IF: A material breach of this Agreement is not cured within the cure period stated in this Agreement (or, if none is stated, a reasonable cure period); THEN: The non-breaching party may terminate this Agreement by written notice to the breaching party.

103. No prejudice to other remedies

For the avoidance of doubt, termination of this Agreement for material breach is without prejudice to any other remedies available to the non-breaching party except to the extent expressly stated otherwise in this Agreement.

104. Survival of certain provisions

The rights and obligations set forth in this Agreement (if any) concerning the following subjects will survive any termination of the Agreement (including for this purpose any expiration of the Agreement):

- Confidentiality.
- Indemnification and defense against third-party claims.

- Insurance requirements.
- Intellectual property ownership.
- Warranty rights and –disclaimers.
- Remedy limitations and limitations of liability.
- Governing law / choice of law.
- Forum selection / choice of forum.
- Arbitration.
- Early neutral evaluation.
- Attorneys' fees.
- Expense-shifting after settlement-offer rejection.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Termination at discretion

[Opt-in language: “Either party may terminate this Agreement in its business discretion upon five business days’ notice, but not before DATE.”] (a) Each specified party may terminate this Agreement in its business discretion effective the stated time after notice of termination. (b) A termination under this section will not be effective before the stated date. (c) For the avoidance of doubt, a discretionary termination will not affect (i) the parties’ respective rights and obligations existing as of the effective date of termination, nor (ii) those rights and obligations surviving termination, if any.

202. Termination for insolvency, etc.

[Opt-in language: “Either party may terminate this Agreement for the other’s insolvency, etc., upon five business days’ notice.”] Subject to any restrictions imposed by law, the specified party may terminate this Agreement, effective the stated time after notice of termination, if the other party does any of the following: (1) ceases to do business in the normal course; (2) becomes insolvent; (3) admits in writing its inability to meet its debts or other obligations as they become due; (4) makes a general assignment for the benefit of creditors; (5) has a receiver appointed for its business or assets; (6) files a voluntary petition for protection under the bankruptcy laws; (7) becomes the subject of an involuntary petition under the bankruptcy laws that is not dismissed within 60 days.

203. Termination for business-reputation risk

[Opt-in language: “Either party may terminate this Agreement upon five business days’ notice for business reputation risk created by the other party.”] The specified party may terminate this Agreement, effective the stated time after notice of termination, if the other party engages in

conduct creating a substantial risk of damage to the terminating party’s business reputation.

204. Multiple- or repeated breaches can be a material breach.

[Opt-in language: Use the title of this section.] For the avoidance of doubt, multiple- or repeated breaches may, in appropriate circumstances, collectively constitute a material breach even if some or all individual breaches are cured.

205. The non-breaching party may suspend its own performance.

For the avoidance of doubt, in cases of material breach, a non-breaching party that has given notice of breach may, by giving notice thereof, suspend its own performance until the breach is substantially cured.

206. Cure-efforts status reports are required.

[Opt-in language: Use the title of this section.] The breaching party will provide status reports concerning its efforts to cure the breach (if any) at the reasonable request of the non-breaching party. Status reports are to include, as applicable, reasonable information about the breaching party’s goals, progress, problems, action plans, and assumptions in its curative efforts.

— END OF PAGE —

3. Notes

Notes for § 101 Breach cure periods

Why is this provision included? A party that thinks it might find itself in breach of contract will want at least some ability to cure the breach to avoid termination of the contract.

What if it were left out? Under applicable law, ● the breaching party likely would be liable to the non-breaching party for any damages resulting from the breach, even if the contract were not terminated; and ● if the breach were “material,”¹ the non-breaching party might well be able to terminate (or rescind) the contract.

Alternative: The cure period could begin upon occurrence of the breach – but that would require the breaching party to know that the breach had occurred.

ALERT: Contract negotiators should carefully consider the various specific cure periods listed here. A non-breaching party’s business people, with the benefit of 20-20 hindsight, might be furious at their negotiator for agreeing to (what they now scorn as) ‘such a long cure period,’ or vice versa.

Notes for § 102 Termination for breach

Why is this provision included? A termination-for-breach provision is pretty standard.

Material breach: Alternatively, termination could be available as a remedy for any breach, not just a material breach. This might be acceptable to the other side for some types of contract, but in many cases it might be objectionable.²

Comments: In many situations, there may be little practical benefit to being able to “terminate” an agreement per se, even for material breach. ¶

Termination notice: Some courts have held that a notice terminating an agreement must be “clear and unequivocal.”³

¹ The Restatement (Second) of the Law of Contracts, which is excerpted in the Wikipedia article [Breach of contract](#), offers suggestions about factors that can be “significant” in assessing whether a given breach is material.

² See note 1 for a link to materiality reading material.

³ See, e.g., *Cedar Rapids TV Co. v. MMC Iowa LLC*, No. 07-3899, at 10 (8th Cir. Apr. 3, 2009) (affirming judgment that language of letter did not suffice as notice of termination; citation and internal quotation marks omitted).

Notes for § 103 No prejudice to other remedies

[Reserved]

Notes for § 104 Survival of certain provisions

Why is this provision included? A survival provision is pretty typical in contracts of any length. **What if it were left out?** Trial counsel for one party or another might try to argue that a contractual right or obligation ended when the contract did.

Comment: Drafters should be careful about what rights and obligations would survive termination – see “[Night of the Living Dead Contracts](#),” by Jeff Gordon (accessed Dec. 3, 2010).

Notes for § 201 Termination at discretion

Should I ask for this? A discretionary termination provision might make sense if the main purpose of the contract is to provide a framework for discrete transactions. For example, a customer that has a master purchase agreement with a vendor might want the right to terminate the master agreement at any time.

Should I object? A party that expected to make significant investments in support of the contract likely would object to giving the other party the right to pull the plug at will, at least not before the first party had had enough time to recoup its investments. ¶ Ditto with a party that expected to depend significantly on the other party’s performance.

Business discretion – subdivision (a): The “in its business discretion” language is included to negate any good-faith test that might be imposed by law.⁴

Notes for § 202 Termination for insolvency, etc.

Should I ask for this? Some companies want the ability to throw a contractor off the sleigh discretionary termination provision might make sense if the main purpose of the contract is to provide a framework for discrete transactions. For example, a customer that has a master purchase agreement with a vendor might

⁴ See generally Matthew Hicks, [Termination for Convenience: It’s All About ‘Good Faith’](#) (Sept. 2010; accessed Oct. 4, 2010).

want the right to terminate the master agreement at any time. **Should I object?** A party that expected to make significant investments in support of the contract likely would object to giving the other party the right to pull the plug at will, at least not before the first party had had enough time to recoup its investments. ¶ Ditto with a party that expected to depend significantly on the other party’s performance.

Note: In the U.S., many such clauses will be unenforceable under 11 U.S.C. § 541(c) if the nonterminating party files a petition in bankruptcy.⁵

Question: If a court held a clause like this to be unenforceable, would a [savings clause](#) deter the court from tossing out the entire agreement?

Notes for § 203 Termination for business-reputation risk

Comment: Termination for “bad behavior” may be a controversial point, but some customers want the ability to throw an errant supplier under the bus to avoid being tainted by the resulting bad publicity.

Notes for § 204 Multiple- or repeated breaches can be a material breach.

Should I ask for this? Sometimes enough is enough; in that kind of situation, this provision would let a non-breaching party declare a material breach (and, usually, terminate or even rescind the contract). **Should I object?** The language here is just a bit vague; for example, what would be “appropriate circumstances”? Also, should just two cured breaches warrant declaring a material breach?

Notes for § 205 The non-breaching party may suspend its own performance.

Should I ask for this? Consider a hypothetical example: Customer fails to make a required progress payment for services. The provider is about to have to invest a lot more money to continue with the work. The provider may well want to stop work until payments are caught up; otherwise, it will be at risk of losing not

⁵ See Robert L. Eisenbach III, [Are “Termination On Bankruptcy” Contract Clauses Enforceable?](#) at <http://bit.ly/8hQAKQ> (Sept. 16, 2007; accessed Mar. 30, 2009).

just what it has already spent to perform the services, but even more.

What if it were left out? In many jurisdictions this clause might technically be superfluous, because at common law, in cases of material breach the non-breaching party is allowed to suspend its performance.⁶

Further reading: If the contract is primarily for the sale of goods, see also [UCC §§ 2-609](#) and [703\(2\)](#), which address this and related issues.

Notes for § 206 Cure-efforts status reports are required.

Should I ask for this? If your business would be seriously affected by the other guy's breach, you likely would want the right to demand to know the status of his cure efforts. Realistically, though, if the other guy is a good corporate citizen, he's likely to keep you updated voluntarily, even without a contract obligation. And if he turns out to be uncooperative, then this provision might not give you much more real leverage over him than you would already have because of his original breach. **Should I object?** If you think you could end up as a breaching party, you might not want to commit to preparing and sending status reports to the other side, because that could take up valuable time — especially if one incident puts you in breach of a lot of contracts at once. (On the other hand, posting periodic updates by email and on your Web site might be enough to do the job.)

Comment: One possible benefit of this section is that status reports on cure efforts might help salvage the parties' working relationship.

⁶ See footnote 1 for a discussion of materiality.

Business Operations - General

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Independent contractors

(a) Neither party will hold itself out as an employee, agent, partner, joint venturer, division, subsidiary, or branch of the other party, and nothing in this Agreement is to be interpreted as creating any such relationship between the parties. (b) Neither party has, nor will it hold itself out as having, authority to make commitments or representations on behalf of the other. (c) No signatory party, in entering into this Agreement, intends to enter into a fiduciary relationship.

102. Publicity restrictions

Neither party will issue any press release about, or otherwise publicly disclose the existence or terms of, (i) this Agreement, or (ii) the parties' business relationship contemplated by this Agreement, EXCEPT with the prior written consent of the other party.

103. Site- and network access ground rules

Each party (the *visiting party*) shall cause personnel subject to its control who visit physical premises or access a computer system or network (collectively, *site*) of **another party** (the *visited party*) to comply with such reasonable site rules and policies as the visited party may timely communicate to the visiting party.

104. Subcontracting ground rules

(a) This section applies to any use of subcontractors by a provider, but in itself it neither authorize nor prohibit the provider's use of subcontractors. (b) For the avoidance of doubt: (1) The customer's review and/or approval of a subcontractor or a subcontracting agreement, if any, will not excuse the provider from its obligation to select its subcontractors (if any), enter into appropriate subcontracting agreements, oversee the subcontractors' work, pay the subcontractors, and the

like. (2) Nothing in this Agreement is to be deemed as creating a direct contractual relationship between the customer and any subcontractor. (c) At the customer's written request from time to time, the provider will seasonably provide the customer with information about its subcontractors (if any) to the extent reasonably necessary for the customer to make any reports required (i) by law (for example, reports concerning equal opportunity or executive compensation) or (ii) by the customer's contract with a governmental entity or a government contractor. (d) A provider's written agreements with its subcontractors under this Agreement (if any) will include all government contracting provisions (if any) that are required by law to be included in such subcontracts.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Export-controls compliance

*[Opt-in language: "Export-controls compliance is required of **each party**."]*

(a) Each specified party (each, a *complying party*) will comply with applicable export-control laws with respect to any commodity or technical data (including for example software) obtained or created pursuant to this Agreement (each, a *covered item*). (b) Without limiting subdivision (a), no complying party will export or re-export *covered items* to *prohibited destinations* or *restricted persons*. As used in this section: 1) *Prohibited destination* includes, for example, any U.S.-embargoed countries. (2) *Restricted person* refers to any person listed on any government list prohibiting the listed persons' access to a covered item, including for example: (i) the U.S. Department of the Treasury's list of Specially Designated Nationals, and (ii) the U.S. Department of Commerce Denied Persons List or Entity List. (c) Each complying party **represents** to the other party that: (i) it is not a *restricted person*; (ii) it is not a citizen or resident of any country embargoed by the United States;

and (iii) it has not had its export privileges suspended, revoked, or denied by any governmental authority. (d) In connection with this Agreement, no complying party will use *covered items*, nor permit or knowingly assist in their use, for any purposes prohibited by United States law, including, without limitation, the development, design, manufacture or production of nuclear, missiles, or chemical or biological weapons. (e) Each complying party will, upon request and at its own expense, provide the other party with such written assurances and other documentation as may be reasonably necessary to comply with export-related law.

202. Publicity: Press release announcing Agreement

[Opt-in language: "Publicity: The parties will jointly issue a mutually-approved press release announcing this Agreement."] The parties will jointly issue a press release announcing their entry into this Agreement; the press release must be approved by each party, with approval not to be unreasonably withheld.

203. Subcontracting approval

[Opt-in language: "Subcontracting approval is required."] (a) Any use of subcontractors by a provider in carrying out its obligations under this Agreement requires the customer's prior approval. (b) A provider's use of specific subcontractors and/or subcontracting agreements requires the customer's prior approval only if and to the extent so specified in this Agreement or the statement of work.

— END OF PAGE —

3. Notes

Notes for § 101 Independent contractors

Why is this provision included? This type of clause is arguably becoming more important as companies increasingly outsource their work to contractors instead of keeping it in-house.

No fiduciary relationship – subdivision (c):

This is a lawyer-repellant clause, intended to deter aggressive litigation counsel from arguing that one party (usually a vendor) allegedly had fiduciary obligations to another party (usually a customer).

ALERT: This clause (or any other like it) might not be enough to do the job.¹

Notes for § 102 Publicity restrictions

Why is this provision included? One or another party might want to keep the parties' relationship confidential, and/or to maintain control over commercial use of its name.

Notes for § 103 Site- and network access ground rules

Why is this provision included? Customers sometimes have clauses like these in their standard form agreements, sometimes in a very biased one-way form. The "reasonableness" qualifier should prevent undue customer heartburn for the two-way version in this provision.

Notes for § 104 Subcontracting ground rules

Review and/or approval – subdivision (b)(1):

This provision attempts to forestall later attempts by a provider that the customer was charged with enhanced responsibility for the

success of the project by virtue of its review- and approval rights.

Executive-compensation reports – subdivision (c): Many federal contractors are now required to report executive-compensation information for its subcontractors. See generally Roger Waldron, [Regulatory: Federal Acquisition Regulation Council Amendment Requires Greater Transparency](#) (Sept. 8, 2010; accessed Nov. 1, 2010).

Government-contract clauses - subdivision (d): Agreeing to this clause likely will put additional administrative burdens on a provider, but as a practical matter it might be unavoidable.

Notes for § 201 Export-controls compliance

Should I ask for this? Parties whose business together involves goods or information that are subject to the export-controls laws will often want each other to commit to abiding by those laws, in part to reduce the risk of being criminally indicted for export violations. The export-controls laws in the U.S. are more than a bit complicated, but it's extremely important for companies to sort them out. Noncompliance can lead to all kinds of trouble, including imprisonment for up to ten years; millions of dollars in fines and civil penalties; and denial of export privileges. For additional information, see the Commerce Department's [Introduction to Commerce Department Export Controls](#) (which has links to information about State Department export controls as well).

ALERT: What can be an "export" of information: Disclosure of export-restricted technical data to a foreign national, even in the U.S., can constitute a "deemed export." According to a spring 2009 memo by the Squires Sanders law firm, "... sending an email containing controlled technical data – even to an overseas employee with US citizenship – constitutes an export that requires a license under either the ITAR or the EAR, unless covered by a specific license exemption or exception. Were a US employee to then disclose the contents of such email to a non-US citizen, that act may constitute a separate export transaction – a re-export."²

² Squire Sanders & Dempsey LLP, [Can Using Your BlackBerry Device Overseas Violate the ITAR?](#) in International Trade and Technology Transfer (IT3) Update (spring 2009) (accessed Mar. 25, 2009).

Prohibited destinations, restricted persons – subdivision (b): See generally the following:

- List of [U.S.-embargoed countries](#)
- Treasury Dept. list of [Specially Designated Nationals](#)
- Commerce Dept. [Denied Persons List](#)
- Commerce Dept. [Entity List](#).

Represents – subdivision (c): See generally [this note](#) on the crucial differences between the terms "represent" and "warrant."

Written assurances – subdivision (e): This provision is included because some exceptions to U.S. export-license requirements require that exporter's obtain written assurances that the recipient will not re-export the exported item(s).³

Notes for § 202 Publicity: press release announcing this Agreement

Should I ask for this? Yes, if you think you might get a publicity boost (and maybe an uptick in your stock price, if you're public) from having signed the Agreement. **Should I object?** You might want to keep the fact of the Agreement confidential, and/or you might not want to give the other side a PR boost.

ALERT: A U.S. public company should of course consider whether the contract is a "material" one, in which case the company might be required to file a Form 8-K with the Securities Exchange Commission (SEC).

Notes for § 203 Subcontracting approval is required

Should I ask for this? A customer might want this provision in a services agreement to help it keep tight control of access to its facilities, confidential information, etc. **Should I object?** A provider might be concerned that this provision likely would add to the provider's time and expense of completing (and administering) a project.

¹ See generally: • [Is Your Independent Contractor Really Your Employee?](#), by Jeremy R. Sayre (2007; accessed Oct. 3, 2008); • [Employee or Independent Contractor? The Implications of Microsoft III](#), by Dennis D. Grant of Arter & Hadden LLP (2000; accessed Oct. 3, 2008); • the Fifth Circuit's "economic realities" analysis in, e.g., *Hopkins v. Cornerstone America*, No. 07-10952 (Oct. 13, 2008) (affirming summary judgment of employee status); • the Ninth Circuit's refusal to apply a Texas choice-of-law clause in holding that a California truck driver was really an employee and not an independent contract, in *Narayan v. EGL Inc.*, No. 07-16487 (9th Cir. July 13, 2010) (reversing summary judgment in favor of employer).

³ See generally John Black, [Stop Using License Exception TSR Now!: You Need to Get a New TSR Written Assurance](#) (Export Compliance Training Institute Sept. 7, 2010, accessed Oct. 29, 2010).

Confidential Information

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Definitions

(a) Subject to any additional restrictions that may be imposed by this Agreement, *Confidential Information* refers to information shown to have been the subject of reasonable, effective efforts, by and/or on behalf of a *disclosing party*, to preserve the information in confidence. (b) In connection with these confidentiality provisions, *disclosing party* refers to **each party to this agreement**, and *receiving party* refers to any party to this Agreement that, pursuant to this Agreement, accesses Confidential Information owned or maintained by a disclosing party. (c) For the avoidance of doubt, only Confidential Information owned or maintained by or on behalf of a disclosing party is protected by this Agreement.

102. Exclusions from confidentiality

(a) The term *Confidential Information* does not include information that is shown to have been, at the relevant time: (1) published or otherwise generally known by relevant segments of the public; or (2) known by the receiving party before obtaining access to it under this Agreement; or (3) provided to the receiving party by a third party not under an obligation of confidence benefiting the disclosing party; or (4) independently developed by the receiving party without use of the disclosing party's Confidential Information; or (5) disclosed to a third party, by the disclosing party or with its authorization, without confidentiality obligations comparable to those of this Agreement. (b) For the avoidance of doubt, a specific selection or combination of information will NOT be excluded from Confidential Information status solely by virtue of the fact that some or all of its component parts are themselves so excluded, UNLESS the selection or combination itself, along with its economic value and

principles of operation, are themselves within such an exclusion.

103. Marking of Confidential Information

(a) Information will not be considered Confidential information unless it includes a reasonably prominent, visually-readable notice such as (for example) "Confidential information of [name]" or "Subject to NDA." (b) IF: Particular Confidential Information is initially disclosed without being marked in compliance with subdivision (a), for example in an unmarked writing or via a demonstration, oral presentation, or other manner not conducive to marking; THEN: The information in question will be considered Confidential Information IF the disclosing party (i) identifies the information as confidential at the time of or promptly after the initial disclosure, and (ii) within **ten business days** thereafter, causes a copy or written summary of the Confidential Information, marked per subdivision (a), to be provided to the receiving party.

104. Precautions required

The receiving party shall take reasonable precautions to protect Confidential Information from unauthorized use or disclosure. Such precautions are to be not less than those the receiving party uses for its own information of comparable nature.

105. Permitted Uses

(a) Except as provided in subdivision (b), the receiving party must obtain the disclosing party's prior written consent to any use by it of Confidential Information (each type of such use, a "*Permitted Use*"). (b) IF: As clearly shown by written evidence, the parties are entering into this Agreement in conjunction with any activity listed below in this subdivision (b); THEN: The disclosing party consents to the receiving party's use of Confidential Information during the term of this Agreement to the extent reasonably necessary for the corresponding *Permitted Use*. (1) *Parties' Activity*: Exploring and/or negotiating a potential business relationship between the parties. *Permitted Use*: Assessing the receiving party's interest in,

and/or negotiating the terms of, the relationship. (2) *Parties' Activity*: Entering into another agreement between the parties, and/or including this in another agreement. *Permitted Use*: The receiving party's (i) performance of its own obligations, and (ii) exercise of its right to require performance by the disclosing party, under such other agreement

106. Permitted Disclosures

(a) The receiving party may not disclose Confidential Information of the disclosing party to third parties except (i) as set forth in this Agreement or (ii) with the disclosing party's prior written consent. Each such disclosure is referred to as a "*Permitted Disclosure*." (b) As one illustrative example of a disclosure of Confidential Information, the receiving party may not confirm, to any third party, any correlation or similarity between Confidential Information and information from any other source, except as otherwise permitted by this Agreement or with the disclosing party's prior written consent.

107. Disclosures required by law

The receiving party may disclose confidential information when required by law, for example in response to a subpoena or a search warrant or in a securities filing. The receiving party will (i) promptly advise the disclosing party upon learning of the disclosure requirement, subject to any applicable legal restrictions; and (ii) provide reasonable cooperation with any efforts by the disclosing party, at the disclosing party's request and expense, to limit the disclosure and/or to obtain legal protection for the information to be disclosed.

108. Compliance with law governing disclosures

(a) The receiving party will comply with applicable law in its disclosure and/or use of Confidential Information, including for example laws governing export controls and disclosures of personal financial information or personal health information. (b) This section does not itself authorize any particular disclosure by the receiving party.

109. Return or destruction of Confidential Information

(a) IF: The disclosing party so requests within **10 business days** after the effective date of any termination of this Agreement or expiration of its term; THEN: Within **30 days** after receiving the request, the receiving party will: (1) cause to be returned to the disclosing party, or destroyed, all copies of Confidential Information (including, for example, notes and summaries containing such information) that are in the possession, custody, or control of (i) the receiving party, or (ii) any individual or organization to which the receiving party provided such Confidential Information; and (2) certify to the disclosing party the completion of the return or destruction, noting any known exceptions. (b) The return-or-destroy obligation does not apply to copies of Confidential Information stored in system-type media, such as for example system caches and backup tapes, PROVIDED THAT such media (1) are not readily accessible to users, and (2) are periodically and systematically overwritten in the ordinary course of business.

110. Post-termination confidentiality obligations

For the avoidance of doubt, the confidentiality requirements of this Agreement will continue to apply, notwithstanding any termination of this Agreement or expiration of its term or of any other obligation under it (for example, a non-competition covenant, if any), until such time, if any, as the information in question would not be eligible to be treated as Confidential Information during the term of this Agreement.

111. Disclaimer of certain terms

For the avoidance of doubt, EXCEPT to the extent expressly stated otherwise in this Agreement: (a) All Confidential Information is provided **AS-IS, WITH ALL FAULTS, WITH NO REPRESENTATIONS OR WARRANTIES**; (b) The receiving party is not granted any license rights or ownership rights of any kind, in Confidential Information or other intellectual property of the disclosing party; (c) This Agreement

does not obligate the disclosing party to disclose any particular Confidential Information to the receiving party; (d) This Agreement does not restrict the receiving party's ability: (1) to develop, acquire, market, and/or sell technologies, products, or services similar to or competitive with those of the disclosing party without use of the disclosing party's confidential information; (2) to have one or more such things done for it by third parties; (3) to enter into business- and contractual relationships with third parties; and/or (4) to assign such duties to its personnel as it sees fit.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Affiliate information

[Opt-in language: "Information of affiliates can be protected under this Agreement."] Information of affiliates of the disclosing party is to be treated as Confidential Information if the information (i) otherwise meets the requirements of this Agreement to be treated as Confidential Information, and (ii) is clearly marked as being subject to this Agreement.

202. Disclosures to contractors

[Opt-in language: "Disclosures to contractors are permitted under comparable NDAs."] During the term of this Agreement, the receiving party may disclose Confidential Information to those of its contractors that (i) have a need to know for a Permitted Use, and (ii) are bound by confidentiality obligations that are (x) set forth in a written agreement between the relevant contractor and the receiving party, and (y) are at least as protective of the Confidential Information as the receiving party's obligations under this Agreement.

203. Outside-counsel archival copies

[Opt-in language: "Outside-counsel-only archival copies are permitted."] (a) Any obligation of the receiving party to return or destroy copies of Confidential Information does not apply to a set of outside-

counsel-only archival copies of Confidential Information, including reasonable backups for such copies, PROVIDED THAT (1) such copies are maintained, using responsible security measures, under the direct or indirect control of the receiving party's outside legal counsel (outside counsel), and (2) the archive copies are accessible only (i) by outside counsel and their employees, or (ii) as directed or permitted by a tribunal of competent jurisdiction, or (iii) with the disclosing party's consent. (b) For the avoidance of doubt, indirect control of archival copies includes, for example, maintaining the archival copies in a commercial records-storage facility operated by an individual or organization that, directly or indirectly, is contractually obligated to outside counsel to maintain the copies in confidence.

204. Expiration of confidentiality obligations

[Opt-in language: "Confidentiality obligations will expire **five years after termination**."] (a) No later than **30 days** after any termination of this Agreement, the receiving party may give notice to the disclosing party that the receiving party's confidentiality obligations under this Agreement will expire automatically the specified time after termination of this Agreement or expiration of its term. (b) During the **30-day** period after receiving such notice, the disclosing party may give notice to the receiving party that designates, with particularity, specific trade-secret information as exception to expiration; if the disclosing party does so, then the confidentiality obligations of this Agreement will not expire as to designated information for so long as that particular information remains a trade secret. (c) For the avoidance of doubt, the receiving party's confidentiality obligations under this Agreement will not expire to the extent applicable law requires the information in question to be maintained in confidence.

— END OF PAGE —

3. Notes

Notes for § 101 Definitions

Why is this provision included? This definition of Confidential Information more or less tracks — but is not as restrictive as — the definitions of “trade secret” typically found in state statutes and case law. To be a [trade secret](#), generally speaking, the information must give someone who knows it an economic advantage over someone who doesn’t, but this definition omits that requirement.

What if it were left out? Chances are that a court would apply the definition of “trade secret” (see above).

Additional restrictions: See section [Error! Reference source not found.](#) for optional additional restrictions on what can constitute Confidential Information.

Reasonable, effective efforts: The phrase “reasonable, effective efforts” is intended as a shorthand summary of the usual exclusions from confidentiality set out in section 0.

No laundry list – subdivision (a): Some lawyers for disclosing parties like to include long laundry lists of specific examples of confidential information. No such list is included here because of the difficulty of coming up with a list that’s sufficiently general; a drafter can include such a list in a custom addendum if desired.

Disclosing party; receiving party - subdivision (b): Both disclosing- and receiving parties have a keen interest in defining which party’s or parties’ information will be protected. ¶ A disclosing party will often want the confidentiality obligations to apply only to the receiving party, so that if the receiving party happens to disclose its own confidential information, the disclosing party will not have any obligation of confidence. ¶ Receiving parties, however, often object to a one-way agreement, and push for a two-way agreement — or, if they know they won’t be disclosing their own information, they might try to water down the confidentiality obligations as much as possible.

A two-way agreement allows for later role reversal: It’s entirely possible that at a later date, the parties will decide that they also need to protect the *receiving* party’s confidential information. In that case: the original disclosing party might find itself in the embarrassing position of asking to negotiate a new agreement, because it doesn’t want to have to live with

the obligations it insisted that the receiving party agree to. If the parties did negotiate a new agreement, however, the business people likely would ask pointed questions about why the agreement couldn’t have been “done right” in the first place. So it’s often a good idea to insist that any confidentiality provisions be two-way in their effect from the start, protecting the confidential information of both parties.

Comment: Even in a two-way provision, a good drafter can slant the language in favor of the role he (or she) thinks his client will be playing.

Only the disclosing party’s information is protected – subdivision (c): A disclosing party might want it made very clear that it is under no obligation of confidence with respect to any information of the receiving party.

Notes for § 102 Exclusions from confidentiality

Why is this provision included? Receiving parties typically want to list specific ways by which they can try to disprove confidentiality. Such exclusions from confidentiality technically favor the receiving party by stating explicit what the law usually provides anyway, but disclosing parties almost invariably regard them as acceptable.

What if it were left out? Substantively, in most cases omitting the list of exclusions would probably be no big deal. Lawyers who negotiate confidentiality agreements, however, are accustomed to seeing an exclusions section, so I’ve included it in the basic protocol.

Independent development – subclause (a)(4): A receiving party is likely to have a tough time convincing a judge or jury that it independently developed the information unless it can corroborate its oral testimony with lab notebooks or other evidence.¹

¹ Judges and juries can sometimes refuse to believe oral testimony about independent development, especially if the putatively-independent developers had access to confidential information. I saw this first-hand as co-counsel for the defendant at the trial in *Celeritas Technologies, Ltd. v. Rockwell Int’l Corp.*, 150 F.3d 1354 (Fed. Cir. 1998), in which the appeals court affirmed judgment on a jury verdict that Rockwell had breached an NDA by using technology disclosed to it by Celeritas. The appeals court observed that “[s]ignificantly, Rockwell did not independently develop its own ... technology [sic], but instead assigned the same engineers who had learned

Disclosed without confidentiality obligations – subclause (a)(5): Some disclosing-party negotiators might object to the exclusion of information that gets disclosed without restriction to third parties. That should be a fruitless objection, though, because in general that’s pretty much the way the law works. *Example:* in April 2010, Lockheed Martin won a \$37 million verdict against a competitor for misappropriation of trade secret — but then the judge ordered a new trial because, he found, Lockheed Martin had withheld email evidence suggesting that the company had disclosed the trade secrets in question to a competitor without restrictions.²

ALERT: Some badly-drafted confidentiality exclusion clauses categorically exclude information sought under subpoena, a search warrant, etc. Under such clauses, arguably even the mere issuance of a subpoena, etc., for confidential information would completely strip the information of its confidentiality status. This would normally be a big mistake, because it might deprive the disclosing party of the benefit of any confidentiality protections in the subpoena itself or in a protective order entered by the court. The better approach is to provide that the receiving party may disclose confidential information pursuant to a subpoena, etc., as long as it meets certain conditions, as in [section 206](#).

Selections and combinations – subdivision (b): Aggressive trial counsel for receiving parties sometimes try to argue that (i) individual bits and pieces of confidential information are publicly known, and so therefore (ii) the combined bits and pieces supposedly cannot be confidential, and thus (iii) the receiving party (supposedly) did not misappropriate the confidential information. The law is generally otherwise,³ but even so, disclosing parties some-

of Celeritas’s technology under the NDA to work on the ... development project” (emphasis added).

² See R. Robin McDonald, *Discovery Failure Sinks Lockheed’s \$37 Million Win*, Apr. 6, 2010; see also a blog posting by Todd Sullivan at <http://goo.gl/PpEW>. The case later settled; see [this Law.com report](#).

³ See, e.g., *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. 1990) (“[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectible secret”), quoted in *Waterville Investment, Inc. v. Homeland Security Network, Inc.*, No. 08-CV-3433 (E.D.N.Y. Jul. 2, 2010) (granting summary

times ask for language like this in their agreements to give them summary-judgment ammunition.

Notes for § 103 Marking of Confidential Information

Why is this provision included? Receiving parties very often ask for a marking requirement for two reasons: 1) So their employees will know what information they have to treat as confidential; 2) to make it clear that unmarked information is fair game for the receiving party to use or disclose as it pleases. Disclosing parties usually agree to a marking requirement as long as catch-up marking is allowed, as is the case in subdivision (b).

What if it's left out? Chances are that a disclosing party will mark its confidential information as such in any case – if it didn't do so, it might be at risk of having a court hold that it didn't make reasonable efforts to keep the information confidential.

Comment: A marking requirement usually does not put much of an extra burden on the disclosing party, because the disclosing party already has a practical motivation for marking its protected information: In court, a disclosing party, seeking to show that its information is confidential, will usually tout the fact that it marked its information as indirect evidence of confidentiality. Conversely, courts can sometimes interpret a disclosing party's failure to mark information as indirect evidence that the disclosing party didn't really consider the information to be confidential. ¶ Thus, a marking requirement really should not be that big a deal for a disclosing party.

Possible arguments pro and con: *Receiving-party argument:* “Look, you're going to be giving us information that's confidential, but also information that isn't. We don't want our employees to have to guess which is which, or what they can do with particular information. Suppose you gave us information that wasn't marked at all. Or suppose you let us see and copy unmarked information. We shouldn't have to worry about whether someday you might sue us for using the information. Also, we also like our people to get ‘just-in-time training’ reminding them of their confidentiality obligations. So if you consider information to be confidential, we need you to mark it as

such before you give it to us. Otherwise, we don't want the information to be subject to any confidentiality obligations.” ¶ *Disclosing-party argument:* “Look, we don't necessarily mark all our internal information as confidential. We don't want to have to take on the operational burden of making sure everything we give you is marked. This would be especially true if we were to let you look at and copy our internal files. So we need you to treat any information you get from us as confidential until you can prove it's not.”

Catch-up marking deadline – subdivision (b): What should the disclosing party's deadline be for doing catch-up marking — after which the unmarked information becomes fair game for the receiving party to use without restriction?

The bright-line approach: This section requires catch-up marking to be completed within a stated time, which typically is five to ten business days, but often can be as much as 30 days. This is a bright-line approach that favors the receiving party, because if the disclosing party fails to mark the information by the stated deadline, the information's confidentiality restrictions evaporate. (This assumes confidentiality isn't separately required by applicable law, for example by HIPAA or the Gramm-Leach-Bliley Act.) ¶ Bright-line tests can be advantageous in business contracts. They make life easier on the people who actually have to do the work, and they promote predictability, which is prized in the business world. But here a bright-line approach has the potential to damage the parties' business relationship (assuming one exists). And it's not clear how much good the approach will actually do for the receiving party. ¶ Put yourself in the disclosing party's shoes: If you slipped up and forgot to mark particular information, the receiving party might claim that you've lost all right to control the use of the information. It wouldn't matter whether the receiving party would suffer any prejudice by belated marking — the receiving party (you fear) would assert that the information is no longer confidential, period. If the parties' relationship is supposed to be a collaborative one, that wouldn't be a good thing.

The reasonable-time approach: For collaborative relationships, another approach is to allow catch-up marking within a reasonable time. Sure, that can lead to uncertainty about what “a reasonable time” might be. But that very uncertainty can usefully encourage the parties

to try to work things out, which in turn can help them preserve their business relationship. ¶ In any case, in a collaborative relationship it's no bad thing for the receiving party to call up the disclosing party and ask: “Hey, you didn't mark Document X as confidential; did you intend to do that, or did it just slip through the crack?” The disclosing party gets a chance to protect its information, and the receiving party scores points for being a “good” business partner.

Notes for § 104 Precautions required

Why is this provision included? Disclosing parties nearly always want language like this, in no small part so that they can demonstrate to a court that they themselves took reasonable precautions with their confidential information (which is a proof requirement under [section 1](#), and usually under the law, too).

What if it were left out? A court might treat the lack of a required-precautions provision as constituting (or contributing to) a failure by the disclosing party to take reasonable steps to keep its information confidential — which might doom the disclosing party's case.

Notes for § 105 Permitted Uses

Why is this provision included? Permitted-use clauses are practically universal in confidentiality agreements. Both parties will want to know the extent to which the receiving party is permitted to use the disclosing party's confidential information. Moreover, the disclosing party will want to show a court that it did not allow unrestricted use of its confidential information. (The specific uses to be allowed might depend on the circumstances.)

What if it were left out? The disclosing party could try to argue that the receiving party was *implicitly* restricted in its ability to use the confidential information. (However, an entire-agreement clause might make that difficult.) But a court might find that the absence of use restrictions meant that the disclosing party didn't really consider the information to be confidential after all — meaning that the receiving party might be free to do whatever it wanted with the information.

Comment: Unfortunately, some confidentiality provisions fail to distinguish between *Permitted Use* and *Permitted Disclosure* of confidential information.

judgment dismissing trade-secret claim) (internal quotation marks and citation omitted).

Comment: Concerning subdivision (b): Normally, drafters prefer that contracts be self-contained, and often include an [entire-agreement clause](#) to make sure of it. (The [Parol Evidence Rule](#) supports this principle.) In an NDA, however, adhering to this principle would require the parties to draft – and perhaps negotiate – a statement of permitted use. This strikes me as very often being a time-wasting reinvention of the wheel. So, this clause deliberately refers to evidence outside “the four corners” of the contract (note that the [entire-agreement clause](#) is drafted to take this into account). My thinking is this:

Certainly in theory this language will increase the uncertainty a bit: The parties might later get into a dispute about what should be deemed the “parties’ activity.” And they can’t be 100% certain what extrinsic written evidence might be adduced at trial.

In most cases, however, I think this will be a risk worth taking in exchange for the increased convenience to the parties, because: (i) I suspect the parties’ email exchanges and perhaps other correspondence, will likely establish what constituted the “parties’ activity” associated with entering into the NDA; and (ii) this provision takes advantage of the likelihood that such written evidence will be available – it lets the parties simply sign the NDA, without making them negotiate an individualized statement of permitted use.

Notes for § 106 Permitted Disclosures

Why is this provision included? Permitted-disclosure clauses are practically universal in confidentiality agreements. Both parties want to know the extent to which the receiving party is permitted to re-disclose the disclosing party’s confidential information.

What if it were left out? See the notes to section [1.105](#) concerning restrictions on use of confidential information.

Notes for § 107 Disclosures required by law

Why is this provision included? Provisions for compulsory disclosures are very often found in confidentiality agreements. The receiving party doesn’t want to be caught between a rock and a hard place: It doesn’t want to be in breach of contract if it turns over the disclosing party’s confidential information in response to a subpoena or search warrant. On the other hand, it

doesn’t want to find itself in contempt — or under arrest for obstruction of justice — if it declines to do so.

What if it were left out? I don’t think a receiving party would have much to worry about: A disclosing party likely would have a very hard time claiming that a receiving party breached a confidentiality requirement by complying with legal process such as a subpoena or search warrant, especially if the receiving party made reasonable efforts to preserve the confidentiality of the information.

Language choice: Disclosure when “required by law”: I chose “required by law” over “compelled by law.” This allows for the possibility of securities-filing requirements that, strictly speaking, are not compulsory in the same way that subpoenas and search warrants are.

Language choice: “Promptly” advise: I chose “promptly” because it gives the receiving party some flexibility to accommodate informal requests for cooperation from law enforcement agencies and similar bodies.

Subject to applicable legal restrictions: A receiving party would want to take into account that if it received a grand-jury subpoena or search warrant, it might not be allowed to disclose the fact that information had been requested (and might go to jail if it did).

ALERT: It’s a very bad idea to say that subpoenaed information is categorically *excluded* from confidentiality status from then on, merely by virtue of having been within the scope of a subpoena. In the event of a subpoena, the disclosing party likely would seek a court order that the subpoenaed information can only be used or disclosed in specified ways. That might well preserve the confidentiality of the information, in which case it’d be counterproductive to have the information categorically excluded from confidentiality.

Notes for § 108 Compliance with law

Why is this provision included? Disclosing parties sometimes ask for language like this so that they’ll have an express contractual remedy (and at least some political cover) if the receiving party engages in unlicensed exports of technical data or other unlawful disclosures of confidential information. Moreover, U.S. export-controls laws require affirmative “written assurances” for disclosures to take place under certain exceptions to the export licensing re-

quirements (for example, [License Exception TSR](#)).

What if it were left out? The receiving party presumably would still be required to comply with any applicable legal obligations, but it’s unclear whether the disclosing party would have any contractual remedy if the receiving party breached those obligations.

Notes for § 109 Return or destruction of Confidential Information

Why is this provision included? A return-or-destroy provision is very often seen in confidentiality agreements. It can have both practical benefits (the fewer copies remain in the receiving party’s hands, the less likely it is that confidential information will leak) and legal benefits (in assessing a disclosing party’s claim that it took reasonable measures to protect its confidential information, a court might well give some weight to a requirement that receiving parties return or destroy all copies). ¶ On the other hand, there’s an accompanying danger: Adopting a gold-plated policy that no one follows might be far worse, in later litigation, than having no policy at all. If the disclosing party neglects to follow up on the return-or-destroy argument, another party could portray the disclosing party as not really considering its information to be confidential after all. ¶ This section tries to balance these considerations by imposing a return-or-destroy requirement, but only if the disclosing party expressly asks for it; see also the additional comments below.

What if it were left out? There’s at least some risk that, in the absence of a return-or-destroy requirement in a confidentiality agreement, a court might give less weight to the disclosing party’s claims that it took reasonable steps to protect its confidential information. My hunch, though, is that in most situations leaving out such a requirement shouldn’t be a problem. ⁴

Certification of return or destruction – subdivision (a)(2): It’s not uncommon to see language like this in a confidentiality agreement, and it’s often considered acceptable by receiv-

⁴ Cf. *Vernor v. Autodesk, Inc.*, No. 09-35969 (9th Cir. Sept. 10, 2010) (vacating and remanding district court’s summary judgment): The Ninth Circuit held that Autodesk’s failure to require customers to return outdated software versions did not fatally undermine its contention that it licensed, not sold, its software (therefore, licensees were not entitled to benefits of copyright’s first-sale doctrine).

ing parties. Disclosing parties often want to require the receiving party to provide a certificate of return or destruction. (I suspect that in some cases, an ulterior motive is to give the disclosing party a false certification with which to bash the receiving party if remnant confidential information were ever to turn up in the receiving party's possession.)

Backup tapes, etc. – subdivision (b): Receiving parties very often ask that backup tapes and similar media be exempted from the return-or-destroy obligation. Without such a carve-out, the receiving party might be forced to retrieve, search, and purge its email backup tapes, system caches, etc. That likely would be very burdensome and expensive.

Comment: From a receiving party's perspective, a return-or-destroy obligation really does only two things: (1) It creates a compliance burden for the receiving party — especially if the receiving party's emails, electronic notes, and other on-line documents must also be returned or destroyed; and (2) it gives the disclosing party ammunition with which to paint the receiving party as unreliable or even a scofflaw — “Ladies and gentlemen of the jury, the receiving party obviously didn't take its return-or-destroy obligations seriously; we have no reason to think they took their other confidentiality obligations seriously either.” ¶ When you think about it, the receiving party might not need to be contractually bound to return or destroy confidential information, because it likely has a purely-business motivation: it very well might not want the continuing ‘taint’ that can come with having the disclosing party's information sitting in its files. The parties might be equally served, therefore, by simply omitting a return-or-destroy obligation.

Comment: If the receiving party has disclosed confidential information to a third party, this return-or-destroy language would require the receiving party to retrieve and return or destroy the information.

Notes for § 110 Post-termination confidentiality obligations

Why is this provision included? The disclosing party likely will want this provision (1) to leave no doubt that termination or expiration of the Agreement will not automatically mean termination of the receiving party's confidentiality obligations; and (2) to guard against a later argument that the confidentiality provisions violate the [rule against perpetuities](#) and

therefore are terminable at will (which might or might not be fine with the parties).⁵

What if it were left out? The disclosing party might someday try to argue that the confidentiality obligations did not survive termination or expiration of the Agreement.

“Any other obligation under it”: This language is intended to preclude a receiving party from contending that expiration of a noncompetition covenant released the receiving party from its confidentiality obligations.

Notes for § 111 Disclaimer of certain terms

Why is this provision included? Both disclosing- and receiving parties like to ask for various ones of these disclaimers to deter an ‘imaginative’ lawyer on the other side from later claiming that additional terms were implied. I've packaged up the typical disclaimers into this one section.

Notes for § 201 Affiliate information

Should I ask for this? Disclosing parties sometimes want to be able to give the receiving party not just their own confidential information, but those of their Affiliates as well, without having to get their Affiliates to sign separate confidentiality agreements. This provision offers one way of reconciling that desire with the receiving party's need to know the specific companies to which it owes confidentiality obligations, so that it can properly manage any information it receives.

What if it were left out? Suppose the disclosing party itself furnished its affiliate's confidential information to the receiving party in the same way it did its own information (complying with marking requirements, etc.). In that case, the disclosing party might have a strong argument that the affiliate's information was just as protected as the disclosing party's own information. ¶ On the other hand, suppose the affiliate itself provided its information to the receiving party: The receiving party might have a strong argument that, without more, the information isn't protected by the Agreement's confidentiality provisions.

⁵ See generally Brett A. August and Andrew N. Downer, *Equitable Exceptions to the Rule Against Perpetual Contracts*,” Intellectual Property Litigation, Volume 21, No. 4 (ABA Section of Litigation, summer 2010) ([LINK](#) - requires ABA membership).

Clearly marked – subdivision (ii): Disclosing parties might not want a separate marking requirement for affiliate confidential information.

ALERT: It could be dangerous to make a blanket statement that confidential information of the disclosing party's affiliates will be considered confidential. Consider this hypothetical scenario: ¶ Completely separately from the transaction contemplated by the nondisclosure agreement, an individual in the affiliate organization gives information to an individual at the receiving party. Neither individual, however, knows anything about a nondisclosure agreement or has any sort of confidentiality obligations in mind. ¶ The receiving party makes use of the affiliate's information in its business. The affiliate decides that it wants to claim that the information was confidential, and to prevent the receiving party from using or disclosing it. The receiving party might have valid defenses such as estoppel, but who wants the grief (and expense) of having to litigate the question? ¶ A sledgehammer solution to this problem would be to categorically exclude affiliate information from protected status. But that's probably not the best approach. This section instead tries to balance the parties' interests by requiring affiliate information to be clearly marked as confidential in order for it to be protected.

Notes for § 202 Disclosures to contractors

Should I ask for this? Receiving parties might not want to have to ask permission every time they want to provide Confidential Information to a contractor. **Should I object?** A disclosing party might well object to allowing the receiving party to disclose confidential information to ANY other entity (other than as required by law) without consent: For all anyone knows, a receiving-party contractor might turn out to be a disclosing-party competitor.

Comment: This may not be that big a deal for a disclosing party – if a contractor is indeed a competitor, chances are that it won't want to come anywhere near the disclosing party's confidential information, for fear of getting tied up in litigation down the road.

Notes for § 203 Outside-counsel archival copies

Should I ask for this? Receiving parties sometimes want their outside counsel to be able to

preserve a set of outside-counsel-only archival copies. This is sometimes seen in confidentiality provisions relating to M&A deals **Should I object?** An outside-counsel-archive exception is often considered acceptable by disclosing parties.

Comment: In some situations, an exception for outside-counsel-only archival copies might not be especially useful. • If the receiving party were scrupulous in giving archival copies of all the disclosing party protected information it received to its outside counsel, the archival copy could prove useful in arguing that it never had access to a particular piece of information. • But doing this might not be worthwhile unless protected information were disclosed exclusively in suitably marked writings, or through narrow channels such as an M&A data room. • For less-formal disclosures, the fact that particular information wasn't contained in the receiving party's outside counsel's archival copy might not mean much, and so allowing outside counsel to retain archival copies might not provide much benefit for the receiving party.

Incidentally, the phrase 'outside counsel only' is well understood to lawyers who work in litigation. See, for example, paragraph 11(c) of the [protective order](#) entered in an antitrust case brought by the [U.S.] Department of Justice.

Notes for § 204 Expiration of confidentiality obligations: Five years after termination.

Should I ask for this? Receiving parties often seek to impose a 'sunset' on their confidentiality obligations, in part so that after the stated time, • the receiving party's employees won't have to pay attention to whether or not particular disclosing-party information is confidential, and • the receiving party will be free to use or disclose the information as it sees fit.

Should I object? The disclosing party is likely to object to this language if its confidential information is likely to be of long-lasting value, although subdivision (b) would give it at least some protection.

With particularity – subdivision (b): This phrase should be familiar to litigators — it's based on similar language in [Rule 9\(b\)](#) of the Federal Rules of Civil Procedure.

Trade secret – subdivision (c): Generally speaking, under the law in most U.S. jurisdictions, a 'trade secret' is information (i) that is

not generally known or readily discoverable, and (ii) that gives someone who knows it an economic advantage over someone who doesn't — see generally [Wikipedia's article on trade secrets](#).

Arguments pro and con: A receiving party might argue for such a time limit along the following lines: "We need a 'sunset' on our confidentiality obligations. The information you're going to be giving us seems likely to lose its value over time. After a certain time has passed, we shouldn't have to worry any more whether we need to treat the information as confidential. Besides, if applicable law like HIPAA or Gramm-Leach-Bliley requires continued confidentiality, then the information won't be subject to the confidentiality time limit regardless what this Agreement says. So you shouldn't have anything to worry about."

¶ The disclosing party may well have a very different view, and might respond as follows: "We can't know in advance that any particular information will lose its value over time. For all we know, something we tell you might turn out to be the equivalent of the Coca-Cola® formula. And there's some case law indicating that if we agreed to a time limit, we might later be held not to have taken reasonable measures to protect our confidential information.⁶ So we need for your confidentiality obligations to remain in place unless and until the information in question falls within an exclusion category."

⁶ See Julianne M. Hartzell, [Time Limits in Confidentiality Agreements](#), in American Bar Association, Intellectual Property Litigation, Volume 20, Number 3, spring 2009 (accessed Aug. 12, 2009).

Defects: Warranty and Remedies

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Definitions

(a) *Warranty defect* refers to the following: (i) for goods, a failure of the goods as delivered to conform to requirements expressly stated in this Agreement or otherwise expressly agreed to in writing; (ii) for services, a failure of the services as performed to conform to performance standards expressly stated in this Agreement. (b) *Material defect* refers to a material warranty defect.

102. Defect warranty

The provider warrants to the customer, subject to the limitations set forth in this Agreement, that all goods or services it delivers (if any) in fulfillment of its obligations under this Agreement will be free of any **material warranty defect**. The warranty of the previous sentence is referred to for convenience as the *defect warranty*.

103. Corrective-action remedy

(a) The provider, at its own expense, will make **commercially reasonable efforts** to correct each **warranty defect** that the customer reports in writing to the provider during the **30 days** following the customer's acceptance of the relevant goods or services. At the provider's option, such efforts may include replacing putatively-defective goods or re-performing putatively-defective services, as the case may be. (b) The provider's obligation to make such efforts is conditioned on the customer's *seasonably* providing reasonable information about the defect at the provider's request.

104. Refund as alternative remedy

(a) IF: The provider does not correct a **material defect** within **30 days** after the customer's initial report of the defect; THEN: At the customer's written request, the provider will refund amounts paid by the customer (and/or issue a credit for amounts invoiced but unpaid by the custom-

er) for the defective services or deliverables. (b) The provider may require, as a prerequisite to taking such action, that the customer return or destroy the defective deliverable (and cease all use of it in the case of intangible deliverables such as computer programs, etc.).

105. EXCLUSIVE REMEDIES

The exclusive remedies for any breach of the defect warranty are (i) those remedies expressly set forth in this Protocol, and, (ii) any additional remedies expressly set forth elsewhere in this Agreement, if any.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Exception: Products not originating with provider

[Opt-in language: Copy and paste subdivision (a), editing as desired.] (a) The defect

warranty DOES NOT APPLY to a product furnished by a supplier of the provider. (b) The provider will (i) at the customer's request, provide a copy of any relevant written infringement warranty made to the provider by the supplier, and (ii) to the extent permitted by the supplier's warranty or otherwise agreed by the third party, pass through and/or assign the supplier's warranty to the customer.

— END OF PAGE —

3. Notes

Notes for § 101 Definitions

[Reserved]

Notes for § 102 Defect warranty

Why is this provision included? Customers normally want a defect warranty — and providers also want an *express* warranty to support a disclaimer of *implied* warranties. The “material defect” standard is commonly used (even though parties might disagree about what constitutes a *material* defect).

ALERT: A subtle change in the wording of a product warranty can add years to a customer’s right to sue the vendor for breach of the warranty under the Uniform Commercial Code. Specifically, a warranty of *future* product performance, in contrast to a warranty of the product’s condition *as delivered*, can add to the warranty liability period.

Product *failure* as the breach: Suppose that the vendor warranted that its product would be free from defects for X years after the delivery date. In many U.S. jurisdictions, that warranty would be treated as an explicit guarantee of the product’s future performance. If the product were to fail, the failure itself would be considered a breach of the warranty; the customer could sue for the breach at any time up to (usually) four years after the failure.

Product *delivery* as the breach: On the other hand, suppose that the vendor had promised only that it would repair or replace the product if it failed during the first X months or years after delivery. That language does not explicitly guarantee future performance. If the product were to fail, the courts in many U.S. jurisdictions — but not necessarily all — would deem the breach to have occurred on the date the product was *delivered*, pursuant to [UCC § 2-275](#). In a case governed by the law of one of those jurisdictions, the customer would be forced to bring suit for breach within (usually) four years after delivery, not after the product failure.¹ In such cases, the so-called warranty language is deemed a limitation of remedies. The analysis might be different if the promissory language were deemed a separate ‘ser-

vice contract,” and if the customer sued for breach of the service contract and not for breach of the product warranty.²

Notes for § 103 Corrective-action remedy

Why is this provision included? Customers want a statement of what the provider is obligated to do; providers want the same, but to limit the customer’s right to make demands for still-more corrective action. **Should I object?** Possibly — some customers might insist on imposing more-strict obligations on the provider than [commercially reasonable efforts](#).

Applicability: This clause applies even to services deliverables, whereas [UCC article 2](#) (which applies only to transactions that are primarily about goods) normally would not.

Notice of defect: This provision doesn’t require formal notice of a defect, but it does require a written report, to reduce the chances of later he-said / she-said disputes.

Notes for § 104 Refund as alternative remedy

Why is this provision included? Customers usually want it in writing that they can get a refund if the provider does not make good on warranted defects. ¶ Providing a backup remedy likely is in the provider’s best interest as well: Under [UCC § 2-719\(2\)](#) (which applies to sales of goods), if a limited or exclusive remedy “fails of its essential purpose,” then contractual exclusions of consequential damages and other remedy limitations are likely to be set aside.³

Written request: A written request for a refund is required to avoid later disputes about

whether the customer elected to just live with the defect.

Notes for § 105 EXCLUSIVE REMEDIES

Why is this provision included? Because vendors almost always want to limit their liability for product- and service defects, and an exclusive-remedy provision is a traditional way of doing so.

What if it were left out? Without an exclusive-remedies disclaimer, a customer presumably could invoke any remedies available by law.

Notes for § 201 Exception: Products not originating with provider

Should I ask for this? This exclusion limits the defects warranty to products that originate with the provider. The rationale is that the provider may well have little or no control over defects in third-party products that it acquires and provides to the customer.

Should I object? Possibly — the provider might be in a better position than the customer to oversee the quality of products of third-party suppliers. Indeed, the customer might take the position that this is precisely what the customer is paying for: To have the provider assume responsibility for quality control. (Of course, a provider agreeing to take on that responsibility might well increase its pricing to cover its presumably-increased expense and exposure.)

² See *id.*

³ See, e.g., [RRX Industries, Inc. v. Lab-Con, Inc.](#), 772 F.2d 543 (9th Cir.1985) (affirming judgment against vendor including consequential damages despite contractual exclusion), cited in [Hawaiian Tel. Co. v. Microform Data Sys., Inc.](#), 829 F.2d 919 (9th Cir. 1987) (affirming judgment against vendor including consequential damages, despite exclusion, “because the breach [of contract] was so total and fundamental, the exclusion of consequential damages was unconscionable”). See generally Robert J. Williams, *Getting What You Bargained For: How Courts Might Provide A Coherent Basis For Damages That Arise When Remedies Fail Of Their Essential Purpose*, 5 VA. L. & BUS. REV. 131 (2010); Foley & Lardner, [Protecting Consequential Damages Waivers in Software License Agreements](#) (Feb. 27, 2003; accessed Oct. 8, 2010).

¹ See generally the court’s review of case law in [Trans-Spec Truck Service, Inc. v. Caterpillar, Inc.](#), 524 F.3d 315, part II.B (1st Cir. 2008) (affirming summary judgment dismissing breach of warranty claim under Massachusetts law).

Force Majeure

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Basic provisions

(a) Force majeure may be invoked by **either party** upon the occurrence of one or more events from the following list that causes a failure of timely performance by the invoking party: • fire; • flood; • hurricane, tornado, or other storm; • earthquake; • act of war, whether declared or undeclared, including for example civil war; • sabotage; • act or threat of terrorism; • riot; • act of a public enemy; • invasion; • blockade; • insurrection; • boycott; • nationalization; • embargo imposed by law; • confiscation by a governmental authority not resulting from violation of law by the invoking party; • interruption or failure of electrical power systems or of telecommunications service (for example, Internet failures); • failure of suppliers, subcontractors, and carriers to substantially meet their performance obligations. (b) Failure to pay amounts due under this Agreement may be considered a force-majeure event, but only if the failure resulted from failure of or interruption in one or more third-party payment systems that otherwise qualifies as a force-majeure event.

102. Labor disturbances

For the avoidance of doubt: (a) Labor disturbances **are** eligible to be considered force-majeure events; illustrative examples include strikes, lockouts, work slowdowns, and other labor unrest. (b) Nothing in this section should be construed as requiring a party to take any particular action to prevent, settle, or otherwise avoid, mitigate, or end any such disturbance.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Failure to pay amounts due

[Opt-in language: "Failure to pay amounts due may be excused by force majeure only for third-party payment system interruption."] Failure to pay amounts due under this Agreement may be excused as resulting from force majeure, but only if the failure resulted from failure of or interruption in one or more third-party payment systems that otherwise qualifies as a force-majeure event.

202. Cost increases

[Opt-in language: "Cost increases could be force-majeure events."] For the avoidance of doubt, sustained, substantial cost increases that make the cost of performance unreasonable may be deemed events of force majeure.

203. Specific proof

[Opt-in language: "Specific proof is required to invoke force majeure."] A party invoking force majeure to excuse its failure of timely performance must show that the force-majeure event(s) and their relevant effects (i) were beyond the invoking party's reasonable control and (ii) could not have been avoided through the exercise of due care by the invoking party.

204. Status updates

[Opt-in language: "Status updates are required concerning force majeure."] (a) IF: A party invokes force majeure (either pursuant to this Agreement or applicable law, as the case may be); THEN: If so requested by the other party, the invoking party will provide reasonable information, from time to time, about its efforts — if any — (i) to perform its obligations under this Agreement, and/or (ii) to remedy or mitigate any delay in or failure of such performance. (b) The other party will maintain in confidence all information it receives from the invoking party pursuant to this clause unless and until the information becomes available to the general public.

205. Mitigation efforts

[Opt-in language: "Mitigation obligation for force-majeure: Reasonable efforts."] A party claiming force majeure must make

the specified efforts to mitigate the effects of the force majeure.

206. Termination option

[Opt-in language: "Termination is available to either party if force-majeure delay continues for more than X months."] IF: One or more force-majeure events materially prevents or materially delays a party's performance of its obligations for more than the stated period; THEN: The specified party or parties may terminate this Agreement by, and effective upon, giving written notice of termination to the other party.

— END OF PAGE —

3. Notes

Notes for § 101 Basic provisions

Why is this provision included? Parties sometimes want a force-majeure provision as an “out” in case they’re unable to perform their contractual obligations due to circumstances beyond their control.

Why not “acts of God?” Some force-majeure laundry lists include “acts of God,” but that might be too vague for some drafters’ taste (including mine).

Notes for § 102 Labor disturbances

Labor disturbances: Some customers balk at allowing providers’ labor- and industrial-relations problems to constitute a force-majeure event. Often their rationale is that providers should anticipate and plan for such events. ¶ On the other hand, a provider with a history of labor difficulties might want to limit its liability exposure to customers in case such difficulties impede its performance under the contract.

Notes for § 201 Failure to pay amounts due

Comment: This is akin to a “hell or high water” clause; parties considering agreeing to such a provision should think about what might happen in the event of a financial crisis such as the one of 2008.

Notes for § 202 Cost increases

Should I ask for this? A provider might want this provision if it were concerned about unexpected increases in the price of oil, copper, or other commodities, or in the price of other materials or services.

Comment: This provision is adapted from the clause discussed in *Aquila v. C. W. Mining Co.*, No. 07-4255 (10th Cir. Nov. 7, 2008) (affirming district-court holding that force majeure did not excuse nonperformance).

Notes for § 203 Specific proof

Should I ask for this? Customers wanting to hold their providers’ feet to the fire could ask for this provision, for reasons that should be apparent. **Should I object?** Quite possibly: A provider might not want its recovery efforts to be subject to second-guessing after the fact.

Notes for § 204 Status updates

Should I ask for this? When a provider is subject to force majeure, its customer might be concerned about the potential ripple effects on the customer’s own business. The customer might want status information to help it deal with such ripple effects. **Should I object?** Possibly: • The provider might be concerned that such a status-update obligation could be burdensome, especially if the first party has many customers to whom such a duty is owed. That burden, however, might not be as onerous in this day of near-universal use of email. • The provider might not want its competitors, the press, etc., to know the status of its force-majeure situation, although subdivision (b) is intended to address that concern.

Notes for § 205 Mitigation efforts

Should I ask for this? For reasons that should be apparent, customers likely would want their providers to try to mitigate the effects of force majeure. **Should I object?** Quite possibly: A provider might not want a customer claiming, after the fact, that the provider breached its mitigation obligation by not using sufficient recovery efforts.

Reasonable efforts: See the definition of *reasonable efforts*. POSSIBLE ALTERNATIVES: “... must use *commercially reasonable efforts* ...” • “... *best efforts* ...” • “... *responsible efforts*”

Comment: A mitigation-efforts requirement in a force majeure clause could give rise to a whole series of subsidiary issues to be negotiated. For example, if a supplier found itself unable to make deliveries because of force majeure, the question might arise whether the supplier must treat all its customers equally, or whether it could favor some over others. If the contract does not explicitly state the supplier’s mitigation obligations, courts will often be reluctant to second-guess the supplier’s mitigation efforts.¹

Notes for § 206 Termination option

Should I ask for this? One or both parties might want a termination right. **Should I object?** That will depend on the circumstances.

¹ See *Wisconsin Elec. Power Co. v. Union Pac. R.R. Co.*, No. 08-2693, slip op. at 10-11, 13 (7th Cir. Mar. 2, 2009) (affirming summary judgment that railroad had properly invoked a force-majeure clause to increase its rates for shipping coal).

General Provisions

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Additional or different terms

(a) Neither party is obligated to give effect to additional or different terms (*new terms*) in any purchase order, confirmation, invoice, or similar document that may be provided by the other party in connection with a transaction pursuant to this Agreement (*new-terms document*) unless the new-terms document meets the requirements of this Agreement to amend it. (b) For the avoidance of doubt, a party's performance of actions called for by *new terms*, without more, is not to be deemed that party's assent to the new terms.

102. Amendments in writing

For an amendment to this Agreement to be effective, it must: (i) be in writing; (ii) refer to this Agreement and state that it is being amended; (iii) set out the terms of the amendment; and (iv) be signed by the party sought to be bound.

103. Assignments – general provisions

(a) An assignment of this Agreement operates as a transfer of the assigning party's rights and a delegation of its duties under this Agreement, but it does not relieve the assigning party of its responsibility for performance of those duties. (b) A non-assigning party will preserve in confidence any non-public information about an actual- or proposed assignment of this Agreement that may be disclosed to that party by a party participating in, or seeking consent for, the assignment.

104. Entire agreement

This Agreement sets forth the parties' final, complete, exclusive, and binding statement of their agreement concerning its subject matter. Except as stated in this Agreement, there are no promises, understandings, representations, or warranties of any kind between the parties concerning that subject matter.

105. Notices

(a) All notices sent pursuant to this Agreement (i) must be in writing, and (ii) if addressed to an organization, must be marked for the attention of a specific individual, office, or position in the organization. (b) Permissible addresses for notice include those stated in this Agreement and any other address reasonably communicated. (c) Notices are effective upon receipt or refusal; notices addressed to an organization are effective upon receipt or refusal by an individual who is the organization's agent for purposes of receiving communications of the general type sent (for example, a mailroom clerk). (d) A notice that is sent by email but is not read by the addressee is nevertheless effective if, but only if, it has been delivered to an email account whose address has been designated in writing, by the party being notified, as an address to which notices may be sent. (e) Notices to a party that cannot be found are deemed effective after reasonable delivery efforts. (f) Each party giving notice under this Agreement is encouraged, but not required, to send a copy of significant notices to the notified party's counsel by any reasonable means; a significant notice might be, for example, a notice of breach or of termination.

106. Redlining

Each party represents that it or its counsel has 'redlined' or otherwise called attention to all changes that it made and sent to the other party in previously-sent drafts of this Agreement, including but not limited to drafts of any attachments, schedules, exhibits, addenda, etc.

107. Savings clause

IF: A provision of this Agreement is held invalid, void, unenforceable, or otherwise defective by a tribunal of competent jurisdiction; THEN: (1) All other provisions of this Agreement will remain enforceable in accordance with their terms; AND (2) the provision in question will be deemed modified, but only: (i) as between the parties, (ii) in the jurisdiction in question, (iii) to the minimum extent necessary to

cure the defect, and (iv) until such time, if any, as the tribunal's holding, in relevant respects, is vacated, reversed on appeal, legislatively overruled, or otherwise set aside.

108. Signature & delivery procedures

This Agreement may be signed and delivered (including by electronic transmission of signed signature pages) in separate counterpart originals; all such counterparts will be deemed to constitute one and the same instrument. Any counterpart may comprise one or more duplicates, any of which may be signed by less than all of the parties provided that each party whose execution is required signs at least one of the same.

109. Third-party beneficiaries

The parties do not intend for this Agreement to create any right or benefit for any party except themselves, other than to the extent (if any) expressly stated in this Agreement.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Assignment consent requirement

[Opt-in language: "Assignment by [party name] requires consent."] The specified party and its successors in interest may not assign this Agreement, nor any right or interest arising out of this Agreement, in whole or in part, to any other person without the express prior written consent of the other party or its successor in interest, as applicable, except as otherwise provided in this Agreement. A putative assignment made without such required consent is of no effect.

202. Assignment of assets

[Opt-in language: "Consent is not required for an assignment of assets."] This Agreement's assignment-consent requirement does not apply to dispositions of substantially all assets of the assigning party's **business to which the Agreement specifically relates.**

203. Assignment to affiliate

[Opt-in language: “[Party name] may assign without consent to a control-relationship affiliate.”] This Agreement’s assignment-consent requirement does not apply to assignments to a *control-relationship affiliate* of the assigning party if the assigning party unconditionally guarantees the affiliate’s performance of the assigning party’s obligations under this Agreement.

204. Assignment termination option

[Opt-in language: “A non-assigning party may terminate this Agreement **within 60 days**.”] A non-assigning party may terminate this Agreement, in its *business discretion*, by giving notice to that effect no later than the specified time after receiving notice from either the assigning party or the assignee that an assignment of the Agreement has become effective.

205. Assignment consent materiality

(a) *Applicability*: This section applies if this [Opt-in language: “Assignment consent breaches are material.”] IF: A party breaches any requirement of this Agreement that the party obtain the consent of another party to assign this Agreement; THEN: Such breach is to be treated as a material breach.

206. Attorneys’ fees

[Opt-in language: “Attorneys’ fees will be awarded to [the prevailing party] [a party successfully bringing an action to enforce this Agreement].”] (a) In any *action* in any forum **arising out of or relating to this Agreement or any transaction or relationship resulting from it**, the specified party will be entitled to its *expenses* and *costs*, in addition to any other relief that may be granted. (b) For the avoidance of doubt, for purposes of this section: *Action* refers to any action or proceeding, whether judicial, administrative, arbitral, or other. *Costs* refers to costs of the action, for example costs of court or of arbitration. *Expenses* refers to reasonable attorneys’ fees and expenses incurred in the action, including for example expert-witness fees and expenses.

207. Counsel representation

[Opt-in language: “**Each party** has been represented by counsel.”] Each specified party has had the opportunity to be represented by counsel of its choice in deciding whether to enter into this Agreement on the terms and conditions set forth in it.

208. Forum selection

[Opt-in language: “Forum selection: [**Location**].”] (a) Any action arising out of this Agreement may be filed in a court having jurisdiction in the specified location. The jurisdiction of such court(s) is nonexclusive unless otherwise specified. Each party agrees to submit to the specific jurisdiction of the stated court(s), solely for actions as specified in this section. (b) For the avoidance of doubt, if subdivision (a) specifies a non-exclusive forum, it is not intended as a waiver of any right a party other than the party filing the action may have under applicable law to seek transfer to another venue. (c) For the avoidance of doubt, nothing in this Agreement is to be construed as a submission by a party to the general jurisdiction of any court or other tribunal, nor as such a submission for any purpose except as specified in this section. (d) IF: This Agreement contains provisions for the arbitration of disputes; THEN: This section applies only to actions not required to be resolved by such arbitration. (e) Unless clearly stated otherwise, this section is not intended to negate or waive any right a party may have by law to remove an action from one court to another, for example to remove an action filed in state court (in the United States) to federal court. (f) For the avoidance of doubt, this Agreement’s forum-selection provisions are not intended to apply to actions or proceedings initiated by non-parties to this Agreement.

209. Governing law

[Opt-in language: “Governing law: [**Location**].”] This section applies if the body of this Agreement expressly specifies a governing law. (a) The law applicable in the specified location will govern any claim, controversy, or other dispute arising out of or relating to this Agreement or any

transaction or relationship resulting from it, without regard to conflicts-of-law or choice-of-law rules. (b) For the avoidance of doubt, subdivision (a) applies, for example, to any dispute about the interpretation, or any alleged breach, of this Agreement.

210. Governing law: The UN CISG is excluded.

[Opt-in language: *Same as the heading of this section.*] The parties expressly agree that the UN Convention on Contracts for the International Sale of Goods (CISG) will not govern this Agreement or any transaction or relationship arising out of it. (For the avoidance of doubt, the previous sentence is not intended and should not be interpreted as an admission by either party that the UN CISG would otherwise apply.)

211. No government contract

[Opt-in language: “This Agreement is not a government subcontract.”] The customer warrants to the provider that transactions under this Agreement are not entered into in connection with any government contract or subcontract to which the customer is a party.

212. Signature authority

[Opt-in language: “Signers represent that they are duly authorized.”] Each individual signing this Agreement on behalf of an organization personally represents that, to the best of *his* knowledge, *his* signature has been authorized by that organization.

213. Waivers must be in writing

[Opt-in language: “Waivers by **either party** must be in writing.”] With a view to avoiding certain contract management- and evidentiary issues, the parties expressly agree that no purported waiver by a specified party of any right or obligation under this Agreement — including for example any purported waiver of this waivers provision — is to be given effect unless it is in a writing signed by that party.

— END OF PAGE —

3. Notes

Notes for § 101 Additional or different terms

Why is this provision included? This section represents an attempt to head off a [Battle of the Forms](#) of the kind contemplated by [UCC § 2-207](#)¹ and sometimes experienced in common law.

What if it were left out? If one party were to object to including this section, the other party should ask itself whether the first party might later try to “re-trade the deal” through the use of its standard printed forms. For example, if the customer’s additional terms will be given effect, the provider may feel that, in each transaction, it will have to review the customer’s “boilerplate” – in which case there would seem to be little point in negotiating detailed terms and conditions now.

Notes for § 102 Amendments in writing

Comment: Courts do not always give effect to written-amendment provisions, especially when the result of doing so appears to be unjust.² See the commentary to the [entire-agreement](#) provision. (In a nutshell, courts sometimes hold that the parties made a valid, enforceable, oral agreement to waive or modify the amendments-in-writing requirement.)

Comment: Note that in contracts for the sales of goods, [UCC § 2-202\(2\)](#) provides that “A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, **but** except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.” (Emphasis added.)

Note: This language requires that amendments expressly refer to the agreement. The

goal here is to make it difficult to claim that “stray” language constitutes an amendment.³

Notes for § 103 Assignments – general provisions

Transfer of rights, delegation of duties - subdivision (a): This section is adapted from [UCC § 2-210\(4\)](#) (which applies only to the sale of goods). Drafters often assume this to be the case for other contracts, but it can’t hurt to spell it out.

What if it were left out? Chances are a court would hold the same way even without this provision; it’s certainly the case that most assignment provisions I’ve seen make no mention of delegation, seemingly assuming it to be an understood thing.

Why is this provision included? This section is intended to discourage leaks (intentional or otherwise), for example of M&A-related information, and the “complications” that can arise from insider trading.

Notes for § 104 Entire agreement

Comment: This is what’s known as an “integration” clause. In some jurisdictions, a court might not enforce such a clause. For example, in a 2008 case, a group of Shell gasoline dealers claimed that Shell had *orally* amended the franchise agreement — this, even though the agreement purported to rule out oral promises. The appeals court affirmed the judgment against Shell. *Marcoux v. Shell Oil Prods. Co. LLC*, 524 F.3d 33 (1st Cir. 2008). The court quoted the Restatement (Second) of Contracts § 209 cmt. b (1981): “Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, *but such a declaration may not be conclusive.*” (Emphasis added.)

Notes for § 105 Notices

Marked for attention – subdivision (a): This language is included because in a corporate setting, hard-copy notices can sometimes go

astray if the mailroom people don’t know whom to send it to.

When effective – subdivision (c): Notices are effective upon receipt or refusal – which can be independently confirmed by delivery services (but see the discussion below about email notices) – and NOT X days after being mailed.⁴

Notices by email – subdivision (d): If the contract is silent, a notice sent by email might well be effective even if no one in the addressee’s organization knows the notice has been received by the email system.⁵ For that reason, a party might not want to rely on email for receiving notices about certain subjects such as breach, termination, etc. If so, the parties could specify that notices about those specific subjects must be in hard-copy delivered by overnight service, certified mail, etc. ¶ An email notice is effective when *delivered* to a designated email account.⁶ If a party did designate a particular email address for notice, it would want to check the inbox for that address regularly to see if any new notices had arrived. For that reason, the party might want to set up a special “notice” email address that automatically forwards to a specific individual — or, preferably, more than one such individual — or to whoever is designated as having a specific role in the company. The forwarding might need to be changed if such an individual goes on vacation or sick leave, changes positions in the company, or leaves the company.

Copy to counsel – subdivision (f): In cases of breach or termination, it’s usually better for a notified party’s lawyers to be brought into the picture sooner rather than later, if for no other reason than to try to get the dispute settled sooner.

EMAIL TO AN INDIVIDUAL – subdivision (b): Notice sent to a specific eligible individual is effective as soon as the person accesses his (or her) email account. This should preclude the

¹ For a readable overview of how the (U.S.) UCC works in this regard, see generally Marc S. Friedman and Eric D. Wong, *TKO’ing The UCC’s “Knock-Out Rule”*, in *The Metropolitan Corporate Counsel*, Nov. 2008, at 47.

² See generally Scott J. Burnham, *Modifications*, in ABA Sec. of Bus. Law, *Never Really Thought About It: Understanding “Miscellaneous” Provisions and Other Background Text in Agreements*, at 1 (Aug. 2010, accessed Oct. 29, 2010).

³ For an example of why this might be needed, see *Stevens v. Publicis, S.A.*, 2008 NY Slip Op 02880 [50 AD3d 253]: A New York appellate court held that an exchange of emails, each of which included the typed name of the sender at the bottom of the message, was sufficient to modify an employment agreement. See also Alix R. Rubin, *Counsel Beware: A Few Keystrokes May Modify An Agreement*, at <http://bit.ly/56r6lx> (July 1, 2008) (accessed July 18, 2008).

⁴ Parties anticipating sending out many routine notices by mail might want to add the latter provision.

⁵ Cf. § 15(e) of the Uniform Electronic Transactions Act (<http://bit.ly/7bsP10>), which states that “[a]n electronic record is received [and therefore an email notice would be effective – DCT] ... even if no individual is aware of its receipt.”

⁶ A party sending an email notice can use the request-delivery-receipt option available in many email systems to get confirmation of delivery — but unfortunately not all addressees’ email systems “play nice” in sending out such confirmations.

individual from seeing an email in his in-box, concluding from the title that it is a notice under the Agreement, and then intentionally not reading the email or even deleting it unread.

Notes for § 106 Redlining

REPRESENTS: See the comment below concerning why this language does not say “represents and warrants.”

Comment: Many and even most contracts get negotiated by emailing electronic drafts back and forth. If changes aren’t “redlined,” it’s usually possible to run a document-comparison program (such as the popular [Workshare](#) software, formerly DeltaView) to do the redlining after the fact. ¶ Eventually, though, the parties are likely to want a handwritten signature on a hard copy of the final contract (although this may be changing as commercial services for [electronic signature](#) become more widely-used). Suppose I send you a signed, original, hard-copy contract and ask you to countersign and return it. Do you do a word-for-word *manual* comparison, to make sure the hard copy matches the agreed electronic document? ¶ If you do a word-for-word comparison, you’re spending time that surely could be put to better use. For example, at the end of a fiscal quarter, when a lot of contracts are in negotiation at once, negotiator time is a scarce resource that has to be used economically. You want to provide as much legal protection for your client as practicable. As the clock runs down on the quarter, however, you also want to try to timely get the customer’s ink on the signature line. ¶ But if you don’t do a word-for-word comparison, how do you know I didn’t surreptitiously change something before printing the document for signature?

The overwhelming majority of lawyers would never try to pull something so underhanded. It’s stupid — if you were to get caught, your reputation could be severely damaged. Other lawyers might start refusing to deal with you. Your negotiation partner (turned enemy) could well report you to the state bar. ¶ But I know two other lawyers who, on different occasions decades ago, unwittingly let their clients sign “bogus” documents that way. Needless to say, their clients weren’t pleased. ¶ And courts might well be unsympathetic to a party that didn’t read what it signed — especially if the other party gave it reason to think changes were made. See, e.g., the [Cambridge North Point](#) case, summarized in this [Alston & Bird](#)

[blog posting](#) by Susan Wilson (accessed 2010-08-15).

A few years ago, as I started doing more and more contract negotiations electronically, I drafted the first version of the clause above to address the surreptitious-changes issue. In recent years I’ve had several lawyers tell me that they loved the language and intended to steal it. ¶ At least with this clause, each side has an indisputably reasonable basis for assuming that the other side isn’t playing dirty. They therefore shouldn’t have to worry about re-reading the hard-copy document before signing it. (It might still make sense to re-read the hard copy anyway, just to make sure it says what you really want it to say.)

Why a representation and not a warranty?

Because the redlining provision is designed for higher-volume, long-term relationship work such as software license agreements. The customer’s contract negotiator also has limited time, and might not be a lawyer. The last thing your sales people want is for the negotiator to get nervous about your language and, taking the path of least resistance, to put your deal aside until next quarter. In my experience, a representation clause comes across as “softer” than a warranty clause, and is less likely to trigger a visceral objection from the other side. ¶ Theoretically, a representation has different legal consequences than a warranty. But in many vendor-customer situations the differences likely will be academic. This will be particularly true in longer-term, high-dollar relationships such as some software license agreements. High-dollar vendors are keenly interested in preserving their customer relationships if at all possible — they generally don’t want to file a lawsuit against a customer except as a last resort. If a customer were unintentionally to make a material change in the contract without marking it, the odds are high that the vendor and customer would try to work things out amicably. In that situation, the mere existence of the representation clause would bestow a fair degree of moral- and bargaining leverage on the vendor. (It’s something an in-house counsel could take to his or her counterpart and ask, “can’t we do something about this?”)

Whether the change in the contract was truly unintentional might well come down to the credibility of the customer’s witnesses — not a comfortable situation for the customer to be in. If a jury were to conclude that a customer had deliberately sneaked in a material un-

marked change in the contract, that likely would be fraud, giving rise among other things to the possibility of punitive damages. That likely would give the vendor even more bargaining power in negotiations to fix the contract wording.

So, on balance, for high-volume, high-dollar, long-term agreements, I prefer a simple representation that the customer is likely to accept readily, over a more-complete warranty-and-reformation clause that might require more time for legal review.

ADDITIONAL READING: See the extended discussion of [redlining etiquette](#) in an entry at contract-drafting guru Ken Adams’s [Adams-Drafting blog](#).

Notes for § 107 Savings clause

Why is this provision included? To reduce the chances that a judge might throw out the whole contract merely because of one problem clause.

As between the parties: Suppose that a company used a form contract; suppose also that a court held that a particular provision — for example, a punitive-damages exclusion in an agreement to arbitrate — was invalid. The company might still want to assert the provision against other counterparties who had entered into the same form contract, and wouldn’t want the savings clause itself to implicitly extend the invalidity to all other counterparties. (The company might be barred from doing so by the doctrine of [collateral estoppel](#), but that’s another matter.)

ALERT: Drafters should consider whether some provisions of this Agreement should NOT be severable, so that the relevant section or sections are applied on an “all or nothing” basis. For example, suppose that an agreement to arbitrate contained a provision for enhanced judicial review of the arbitration award: It might be that, without such an enhanced right of appeal, a party would prefer to take its chances in court, and not want to arbitrate. In that particular situation, an all-encompassing severance clause might not be especially wise.

Notes for § 108 Third-party beneficiaries

Comment: For a third party to be able to claim rights as a beneficiary under a contract, the parties must have intended the beneficiary to

have such rights. The disclaimer of this section should be enough to show that the parties did not have any such intent except to the extent that the Agreement expressly says so. See generally the Wikipedia article on [third-party beneficiaries](#).

Notes for § 109 Signature & delivery procedures

[Reserved]

Notes for § 201 Assignment consent requirement

Should I ask for this? If a party wants to maintain some control over who it's doing business with, this provision can be useful.

Should I object to it? A party agreeing to this provision could find that its strategic destiny is now subject to the whim of the other party; see the examples discussed below.

Alternative: "The specified party may not assign *nor pledge* this Agreement, nor any right or interest"

Background: Under U.S. law, most contract rights are [freely assignable](#), and most contract duties are [freely delegable](#) (absent some special character of the duty) unless the agreement says otherwise. The basic rationale is that commerce and therefore society are better off when parties are free to assign their business-contract rights and obligations.⁷

(In the U.S., **intellectual-property licenses** are among the noteworthy exceptions: in general, a patent- or copyright licensee may not assign its license rights nor delegate its license obligations without the licensor's consent. **Personal services contracts** also might not be assignable without consent. And **contracts with government entities** likewise might not be assignable by a private contractor, under the federal Anti-Assignment Act, [41 U.S.C. § 15](#), or state-law equivalents such as New York's State Finance Law [art. 9, § 138](#).)

In some situations, however, the parties will not want their opposite numbers to be able to assign the agreement freely; contracts often

include language to this effect, such as this provision.

Suppose an agreement contains a provision like this one, saying that one party must give its consent to any assignment by the other party. That can give the non-assigning party quite a bit of leverage if the assigning party finds itself in an M&A- or corporate reorganization situation.

Example: the Dubai port deal: In 2006, a Dubai company that operated several ports in the United States agreed to sell those operations. (The agreement came about because of publicity and political pressure about the alleged national-security implications of having Middle-Eastern companies in charge of U.S. port operations.) A complication arose, however, in the case of the Port of Newark: The Dubai company's lease agreement gave the Port Authority of New York and New Jersey the right to consent to any assignment of the agreement. According to the [NY Times story](#), that agency initially demanded \$84 million for its consent; after harsh criticism from political leaders, the Port Authority backed down a bit: it [gave consent](#) in return for "only" a \$10 million consent fee, plus \$40 million investment commitment by the buyer.

Example: Internal corporate reorganization: An internal corporate reorganization can also be screwed up by an assignment-consent clause in a contract involving an intellectual-property license (for example, a software license). For example, in 2009, a software vendor successfully sued its customer to force it to re-buy its license, at a cost of almost \$500K, after the customer did an internal reorganization without the vendor's consent.⁸

Notes for § 202 Assignment of assets

Should I ask for this? If a contract includes restrictions on assignment, many companies might regard the absence of an exception for an asset sale of the business as a deal-killer. A prospective assigning party might argue for an asset disposition carve-out along the following lines: "*We need to keep control of our strategic destiny. If we ever wanted to sell a product line or a division, or even the whole company, in an asset sale, we would need to be able to*

assign this agreement as part of the deal, without worrying about whether some executive at your company is going to get greedy and try to hold us up for a consent fee."

Should I object to it? The prospective non-assigning party, however, might respond with something like this: "*What if you decided to sell a product line or a division to one of our competitors, or to someone we didn't like? We need to retain control over that possibility, and the only way to do that is for us to retain the absolute right to consent to any assignment you might make.*"

Comment: The prospective assigning party's concern about being "held up" is a real one: See the commentary at section [201](#) concerning the 2006 Dubai port deal.

Notes for § 203 Assignment to affiliate

Should I ask for this? A prospective assigning party might argue for the right to assign to an affiliate along the following lines:⁹ "*We sometimes routinely move assets around within our 'corporate family'; we want to be able to do so with this contract without having to take the trouble to get your approval.*"

Should I object to it? The other party might reasonably object to the prospective non-assigning party: "*We have no idea whether your Affiliate would be in a position to fulfill your obligations under the contract, nor whether we'd be able to recover from you if there were a breach. If you're willing to unconditionally guarantee your affiliate's performance, we might be able to go along with this. Otherwise, though, we have a problem with this section.*"

Comment: Before approving a blanket affiliate-assignment authorization, consider whether you and your client know enough about the other party's existing- or future Affiliates to be comfortable with where the agreement might end up.

Possible alternative: Termination in lieu of veto: It doesn't have to be all or nothing. Another approach might be to give the non-assigning party, instead of a veto over an assignment, the right simply to terminate the contract as provided in section [204](#). (Of course, the legal-

⁷ See generally, e.g., Randall D. McClanahan, [Assignment, Delegation and Choice of Law Provisions in Commercial Agreements](#), in ABA Sec. of Bus. Law, *Never Really Thought About It: Understanding "Miscellaneous" Provisions and Other Background Text in Agreements*, at 48 (Aug. 2010, accessed Oct. 29, 2010).

⁸ See [Cincom Sys., Inc. v. Novelis Corp.](#), No. 07-4142 (6th Cir. Sept. 25, 2009) (affirming summary judgment in favor of software vendor), [discussed in this blog entry](#).

⁹ See footnote [8](#) for an example of a software customer that could have saved some \$400,000 if it had had a provision like this one in its license agreement.

and business implications of termination would have to be carefully thought through.)

Notes for § 204 Assignment termination option

Should I ask for this? This section can sometimes break an impasse between, say, a customer that wants an assignment-consent right, so as to control with whom it does business, and a vendor that wants to maintain control of its strategic destiny.

Should I object to it? A party insisting on consenting to an assignment by the other party, no matter what, would likely object to this provision.

Notes for § 205 Assignment consent materiality

Should I ask for this? A non-assigning party asking for this provision probably wants the right to terminate *or even to rescind* the agreement if the other party were ever to assign the agreement without consent. That would give the non-assigning party considerable leverage to demand money or other concessions as the price of not exercising the termination- or rescission right.

Should I object to it? Suppose you were to assign a number of contracts to another reputable company, in connection with an asset-sale spinoff of one of your product lines to the other company. Further suppose that your legal team simply overlooked the consent requirement in this Agreement. Would you want the other side of this Agreement to be able to terminate the contract?

Notes for § 206 Attorneys' fees

Should I ask for this? A party that thinks it likely would win any lawsuit would want the other side to pay its legal expenses. See generally [this article](#) (whose authorship is not entirely clear) for ideas to consider in deciding whether to request, or object to, such a clause.

Prevailing party: Some courts have held that, if the putatively-winning side is not the “prevailing party” if it did not receive any monetary damages or equitable relief.¹⁰ Some commentators have suggested that drafters should

specify what they mean by “prevailing party,” but my guess is that most will not want to do so.

ALERT: California Civil Code § 1717 provides, in essence, that any attorneys' fees provision is to be treated as a prevailing-party provision, and states that attorneys' fees under the section cannot be waived.

American rule: The general rule in the U.S. is that each party must pay its own attorneys' fees.

Texas rule: In Texas, absent an agreement otherwise, a party that successfully enforces a claim on an oral or written contract — but *not* a party that successfully defends against an enforcement action — is entitled to recover attorneys' fees. See *Tex. Civ. Prac. & Rem.*

Code § 38.001. Consequently, if a party negotiating a contract thinks it might be more likely to be the defendant in a dispute than the plaintiff, it might want to affirmatively include a “pay your own lawyer” provision in the contract, in the hope of cutting off the plaintiff's statutory right of recovery in such a jurisdiction.

Prevailing-party rule: Some view a prevailing-party allocation (sometimes called the “loser pays” rule, or the “everywhere but America” rule) as fundamentally fair: If you lose a case, presumably you were responsible for the case having to be litigated, so you should pay the attorneys' fees and expenses that you made the winner spend. Big companies, however, sometimes regard litigation expenses as a cost of doing business — and once in a while, they might try to use their superior financial strength as a litigation advantage.

Attorneys' fees awards in arbitration awards:

In an arbitration proceeding, applicable law might override the parties' agreement that attorneys' fees can, or cannot, be awarded.¹¹

Notes for § 207 Counsel representation

Should I ask for this provision? You might want to do so if you might later be perceived as having had a lot more bargaining power than the other side. When judges are asked to invalidate an allegedly-onerous contract

clause — for example, a limitation of liability, a choice-of-law or choice-of-forum clause, an arbitration requirement, a waiver of jury trial, etc. — they will sometimes take into account whether the parties were represented by counsel when they negotiated the contract.

Opportunity, not actual representation: If the evidence showed that a factual statement like this wasn't true, then a judge might well ignore the statement.¹² For that reason, • this provision says that the parties *have had the opportunity* to be represented by counsel, as opposed to, *have been* represented by counsel; and, • the clause refers to *entering into* the Agreement, not to *negotiating* the Agreement, because as a factual matter there might not have been any negotiations.

Notes for § 208 Forum selection

Comment: The above paragraphs of this section provide a plain-English version of what's often referred to as a “forum-selection clause.”

ALERT — disputes “arising out of”: Some drafters like to say that the specified forum applies, not just to disputes “arising out of” the agreement, but also more broadly to disputes “relating to” the agreement. This broader language could be problematic, however, especially in an *exclusive-jurisdiction* clause. As a hypothetical example, consider a software vendor entering into a license agreement with a customer. The vendor might be willing to agree to litigate actions *arising out of* the license agreement in the customer's home jurisdiction. ¶ On the other hand, the vendor might not want to agree up front to litigate all possible *related* disputes in the customer's jurisdiction. For example, suppose that the customer were to help a competitor of the vendor to steal the vendor's trade secrets. In that situation, the vendor might want to be free to bring suit against both the competitor and the customer in the vendor's own home jurisdiction, and not to have to fight over whether the suit was required to be brought in the customer's home court.

ALERT — exclusive jurisdiction: Drafters should think very carefully before approving an *exclusive-jurisdiction* forum selection

¹⁰ See, e.g., *Intercontinental Group Partnership v. KB Home Lone Star LP*, No. 07-0815 (Tex. Aug. 28, 2009) (5-4 reversal of \$66,000 attorneys' fees award to plaintiff that had received a zero-dollar damages award and no declaratory or other equitable relief).

¹¹ See *Recovery of Attorneys' Fees in International Arbitration: the Dueling 'English' and 'American' Rules*, by John L Gardiner & Timothy G Nelson of Skadden Arps, at <http://bit.ly/bMF35d> (accessed Jan. 30, 2010).

¹² **ALERT:** If an untrue factual recital benefits a party that *didn't* draft the contract, the judge likely will *deem* the recital true, reasoning that the non-drafting party was entitled to rely on the recital.

clause. A party might not want to be forced to litigate in one particular place — not even in its home jurisdiction: • Litigating in the other party's home jurisdiction can significantly increase the expense of litigation for the “visiting team,” especially if the case ends up going to trial. Moreover, the visitors may have a legitimate concern about the other side's home-court advantage. • On the other hand, if a potential plaintiff expects it will want speedy relief (for example, a preliminary injunction), it might make sense to agree that it will bring suit exclusively in the defendant's home jurisdiction. Several crucial litigation tasks are likely to go faster there, such as service of process on the defendant and subpoenas for local witnesses. • For the same reason, it might also make sense to agree to a governing-law clause stating that the law of the likely defendant's home jurisdiction will apply — a judge in that jurisdiction will already be familiar with the local law, and proving up a ‘foreign’ law won't be necessary.)

ALERT – courts of a city or state: Think carefully before editing this clause to say that exclusive jurisdiction will be in “the courts of Virginia” or other state — it could constitute a waiver of the right to remove to federal court.¹³

Specific- vs. general jurisdiction: For additional information, see the [Wikipedia discussion](#) of the distinction between *general jurisdiction* and *specific jurisdiction*.

Notes for § 209 Governing law

Arising out of, etc.: The phrase “arises out of this Agreement” is broadened by the phrase “or relates to this Agreement.” The “any transaction or relationship” language allows the parties to specify that a particular law will govern, not just their own disputes, but also

any disputes between third parties that result from the agreement.¹⁴

Choice-of-law rules are excluded from the governing-law selection. Suppose the parties agreed that State A's law would apply. But suppose also that, on the facts of the case, State A's choice-of-law rules would cause State B's law to apply. Presumably that would not be what the parties wanted. Hence, this language excludes choice-of-law rules.

ALERT: If a contract specifies “the laws of the United States” as the governing law, a court might deem the parties to have agreed to the application of federal common law as well as federal statutory law.¹⁵

ALERT: A court might disregard a choice-of-law provision if the choice contradicted a fundamental policy of the forum jurisdiction — for example, if an agreement purporting to be with an independent contractor and reciting that another state's law applied were found actually to be an employment agreement.

Further reading: See generally the Wikipedia article “Choice of law clause” at <http://bit.ly/7dPP31>.

Notes for § 210 Governing law: The UN CISG is excluded.

Comment: See the Wikipedia article on the UN CISG convention at <http://bit.ly/4RGKAI>.

Notes for § 211 No government contract

Should I ask for this? A provider that discovers that it is a subcontractor for a government contract might find itself subject to all kinds of (potentially-expensive) compliance- and reporting obligations in the areas of equal op-

portunity, affirmative action, employment eligibility verification, and the like.¹⁶

Notes for § 212 Signature authority

Should I ask for this? This provision can make signers stop and think — because they are making a personal representation — as to whether they have signature authority, so as to reduce the odds of later problems in that area. ¶ A corporation or other organization might try to get out of a contract by claiming that its signer did not in fact have signature authority (known as *actual authority*). The other side can repel such an effort by showing that the signer had *apparent authority* — that is, that it was reasonable for the other side to have concluded that the signer did indeed have signature authority. An explicit representation by the signer can help the other side make its case on that score.

Should I object? An individual signer might not want to undertake *any* liability exposure on the off chance that his or her signature was not authorized.

Notes for § 213 Waivers must be in writing

Should I ask for this? Should I object to it? Possibly — it depends on which side might want to claim an oral waiver by the other side.

Comment: Courts in some jurisdictions don't always give effect to no-oral-waiver clauses, reasoning that the parties can orally waive the no-oral-waiver clause itself. In this clause, the “parties are aware” language and the “including, for example” phrase represent an attempt to convince the court to give effect to the provision.

¹³ See *Doe I v. AOL, LLC*, No. 07-15323, (9th Cir. Jan. 16, 2009): A group of AOL users sued the company in California. The forum-selection clause in the user agreement required all disputes to be heard in “the courts of Virginia.” The district court granted AOL's motion to dismiss, without prejudice to refiling in a state or federal court in Virginia. The appeals court reversed, agreeing with other courts that the forum-selection clause required litigation exclusively in the relevant *state* courts, not federal courts. (The appeals court also ruled that the forum-selection clause was unenforceable as to California residents because of California's strong public policy favoring class-action relief, which was not available in Virginia state courts.)

¹⁴ Of course, a court might look for reasons to disregard such a choice-of-law provision — especially if the provision appeared to be an attempt to draft around an important local law. Cf. *Narayan v. EGL, Inc.*, No. 07-16487 (9th Cir. Jul. 13, 2010) (reversing and remanding summary judgment; a reasonable jury could find that plaintiffs were employees; recitation of their independent-contractor status was not controlling, and choice of Texas law to govern interpretation of agreement did not affect application of California law to determine their employment status).

¹⁵ The First Circuit did this, albeit by agreement of the parties, in *Powershare, Inc. v. Syntel, Inc.*, No. 09-1625, slip op. at 9 (1st Cir. Mar. 1, 2010) (reversing denial of motion to stay litigation in favor of a pending arbitration).

¹⁶ See generally Holly Emrick Svetz, *You Say You Aren't a Government Contractor – Or Is It Just Wishful Thinking?* (accessed Dec. 8, 2010).

Indemnities

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Applicability of this Protocol

This Protocol governs all obligations arising under this Agreement (if any) that require a party (the “*indemnifying party*”) to defend an individual or organization (a “*protected person*”) against a claim made by a third party.

102. Indemnification against damage awards

(a) The indemnifying party will indemnify the protected person against all monetary awards resulting from the claim, of any kind, made or imposed by any authority having jurisdiction, in a final judgment or award from which no further appeal is taken or possible. (b) Such monetary awards include, for example, damages, penalties, interest, and attorneys-fee awards.

103. Defense obligation

(a) The indemnifying party will provide a competent defense against the claim for the protected person if so requested in writing by the protected person. (b) IF: A protected person fails to timely request a defense; THEN: The indemnifying party will not be responsible for any harm to the protected person that may result from the delay. (c) If the protected person does not request a defense against the claim, the indemnifying party may elect, its *business discretion*, to provide a defense anyway. (d) For the avoidance of doubt, the defense obligation of this section applies, without limitation, to any claim brought in a judicial, arbitration, administrative, or other proceeding, including for example any relevant appellate proceedings in which the claim is at issue.

104. Control of the defense

IF: The indemnifying party provides a defense against an indemnified claim; THEN: (a) The indemnifying party is entitled to control the defense of the claim. (b) The protected person must provide reasona-

ble cooperation in the defense of the claim; the indemnifying party will reimburse the protected person for reasonable out-of-pocket expenses actually incurred in doing so. (c) The protected person must not make any non-factual admission concerning the claim without the indemnifying party's consent. (d) The protected person must not waive any defense to the claim (for example, a statute-of-limitations defense) without the indemnifying party's consent.

105. Control of settlement

(a) The indemnifying party has discretion to settle the claim on behalf of the protected person, PROVIDED THAT the settlement terms do not (i) impose any obligation or prohibition on the protected person, nor (ii) include any admission by the protected person. (b) Any other settlement of the claim by the indemnifying party requires the protected person's prior written consent, not to be unreasonably withheld. (c) If the protected person settles the claim without the indemnifying party's prior written consent (not to be unreasonably withheld), then the indemnifying party will have no liability to the protected person in connection with the settlement.

106. Separate monitoring counsel

(a) A protected person may engage separate monitoring counsel, at its own expense. (b) The indemnifying party will instruct its counsel to consult with such counsel on a reasonable basis. (c) The indemnifying party need not reimburse or indemnify the protected person for expenses of engaging separate counsel.

107. Separate counsel in cases of conflict of interest

IF: A protected person's interests become sufficiently different from those of the indemnifying party, or from those of another protected person, that the defense counsel appointed by the indemnifying party to defend the protected person should withdraw; THEN: The protected person may engage separate counsel, IN WHICH CASE: (i) the indemnifying party will indemnify the protected person for

reasonable fees and expenses of the separate counsel; and (ii) each party will instruct its counsel to make reasonable efforts to minimize duplication of effort and expense.

108. Assumption of control by protected person

A protected person may assume control of its defense. IF: A protected person does so; AND: The indemnifying party has previously tendered performance of its obligation to provide a defense; THEN: The indemnifying party will have no further responsibility or liability to the protected person (including for example defense- and/or indemnity liability) in respect of the claim in question.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Injury-indemnity obligation

[Opt-in language: “*Injury-indemnity obligation applies to PARTY.*”] (a) The specified party will defend and indemnify the other party and its *protected persons* from all third-party claims of death, bodily injury, or loss of or damage to property *proximately caused* by performance of the indemnifying party's its obligations or exercise of its rights pursuant to this Agreement. (b) The obligation of subdivision (a) is referred to as the *injury indemnity* or the *injury-indemnity obligation*.

202. Business-activities indemnity obligation

[Opt-in language: “*Business-indemnity obligation applies to PARTY.*”] (a) The specified party will defend and indemnify the other party and its *protected persons* from all third-party claims arising out of the indemnifying party's business activities, EXCEPT any such claims for which this Agreement expressly makes the other party responsible. (b) The obligation of subdivision (a) is referred to as the *business-activities indemnity* or the *business-activities indemnity obligation*.

— END OF PAGE —

3. Notes¹

Notes for § 101 Applicability of this Protocol

[Reserved]

Notes for § 102 Indemnification against damage awards

Why is this included? A great many indemnity provisions are concerned with third-party claims. An indemnity against monetary awards is almost a *sine qua non* of such a provision.

Notes for § 103 Defense obligation

The indemnifying party may already be required by law to defend the protected party, or to reimburse the protected party for defense costs. See, e.g., *Cal. Civ. Code § 2778*, discussed in *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal. 4th 541, 553 (2008) (affirming court of appeal's affirmance of trial-court judgment that subcontractor, even though ultimately found not negligent, was required to provide a defense to general contractor).

Defense even if not requested – subdivision (c): The indemnifying party might have its own reasons to be concerned about the claim, and therefore is given the option to mount a defense in its discretion.

Notes for § 104 Control of the defense

Control of defense – subdivision (a): If the indemnifying party cannot control the defense, the protected party's lawyers would theoretically have an economic incentive to put on a "gold-plated" defense, secure in the knowledge that the indemnifying party would be footing the bills.

Non-factual admission – subdivision (c): A *non-factual* admission might be that a third party's patent was valid and enforceable. On the other hand, a *factual* admission might be that, in calendar year X, the protected person sold Y units of its Model ABC widget.

Notes for § 105 Control of settlement

Why is this included? Imagine that you're a customer. You've just been notified of a third-

party claim against you. When you look into the matter, you see that the third-party claim comes within the scope of an indemnity obligation you negotiated with one of your providers. What's the easiest thing for you, the customer, to do? That's easy: Write a check, possibly a really big check, to just make the claim go away — regardless of its merits — and then demand reimbursement from the provider. ¶ Needless to say, providers want to avoid being caught in that kind of bind, so they typically insist on maintain control of the settlement, generally subject to restrictions of the kind in this provision.

Notes for § 106 Separate monitoring counsel

Why is this included? A provider that furnishes a claim defense to a customer will often want its own counsel (that is, the provider's counsel) to handle the case. The provider also won't want to pay for two teams of lawyers. The customer, however, might in turn want *its* own counsel to be kept in the loop. This provision offers a compromise: The

Notes for § 107 Separate counsel in cases of conflict of interest

[Should be self-explanatory]

Notes for § 108 Assumption of control by protected person

Should I ask for this? A protected party might want the right to take over control of the defense — but if it does so, it might not be reasonable for it to expect the indemnifying party to continue to foot the bill.

Notes for § 201 Injury-indemnity obligation

Should I ask for this? A party might want this provision if (i) the other party's activities could lead to personal injury and (ii) the first party might be a tempting target for an injured person's lawyers looking for deep pockets.

ALERT: The injury-indemnity obligation might not apply to claims arising from the protected party's negligence.

Alternative: A broader indemnity coverage might result from using the phrase "... or loss of or damage to property arising from performance of the indemnifying party's obligations ..." instead of the text in the provision above.

Notes for § 202 Business-activities indemnity obligation

Should I ask for this? A party might want this provision if (i) the other party could be a target for third-party claims of negligence, gross negligence, breach of contract, violation of law, etc., and (ii) the first party might be a tempting secondary target for third-party lawyers looking for deep pockets.

¹ See generally G. Ross Allen, *The Basics of Indemnification*, in ABA Section of Litigation, Intellectual Property Litigation, Spring 2010, at 7 ([link](#)).

Infringement Warranty & Remedies

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Infringement warranty (limited)

Subject to any exceptions and limitations stated in this Agreement – specifically including, for example, exclusive-remedy provisions and other limitations of remedies – **the provider** warrants to **the customer** that any product or service delivered by or on behalf of the provider in fulfillment of its obligations under this Agreement will be delivered free of the rightful claim of any third party by way of infringement or the like. This warranty is referred to as the *infringement warranty*.

102. Exception: Combination use

(a) For the avoidance of doubt, the infringement warranty DOES NOT APPLY to claims of infringement arising out of use of a warranted product in combination with other goods, if no claim of infringement is made in respect of the warranted product apart from the combination. (b) EXCEPTION: IF: Provider's published user documentation directs Customer to use a warranted product in combination with another product; AND: The combination becomes the subject of a third-party infringement claim; THEN: The infringement warranty DOES apply to that infringement claim, even if the warranted product itself is not a subject of the claim.

103. Exception: Patents

The provider DOES NOT WARRANT that a warranted product or its manufacture, use, or sale does not infringe a patent or design patent.

104. Exception: Compliance with specifications

The customer will hold the provider harmless against any claim of infringement that arises out of compliance with specifications furnished by (i) the customer, and/or (ii) a third party authorized by the customer to do so.

105. Remedy definitions: Depreciation period; stop-use event

For purposes of the infringement remedies of this section: (a) The *depreciation period* is **36 months** from the customer's first acceptance of a shipment of the infringing product. (b) A *stop-use event* is any of the following: (i) a *protected person* stops using a warranted product in order to comply with an injunction against infringement covered by the infringement warranty, duly issued by a court or other tribunal of competent jurisdiction; OR (ii) the provider judges that a protected person should stop using a warranted product because of a claim of such infringement, and so advises customer in writing.

106. Remedy: Defense and indemnity

IF: A third party makes a claim that, if finally successful, would establish a breach of the infringement warranty of this Agreement; THEN: **The provider** will: (i) defend **the customer** and its *protected persons* against the claim, and (ii) indemnify each protected person against any monetary award entered on the claim (including, for example, an award of attorneys' fees) in a final judgment or award from which no further appeal is taken or possible.

107. Remedy: Modify, license, or refund

In any case of a *stop-use event*, the provider – at its own expense – shall do at least one of the following, with the choice being in the provider's business discretion: (i) modify the infringing product to make it non-infringing; (ii) replace the infringing product with a non-infringing substitute that, in all material respects, performs the same functions as the replaced product.; (iii) obtain the right for the customer to continue using the product; and/or (iv) direct the customer to return or destroy the product and refund the customer's paid purchase price prorated over the *depreciation period*.

108. EXCLUSIVE REMEDIES

The exclusive remedies for any breach of the infringement warranty are (i) those remedies expressly set forth in this protocol, and, (ii) any additional remedies expressly set forth elsewhere in this Agreement, if any.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Exception: Products not originating with provider

[Opt-in language: Copy and paste subdivision (a), editing as desired.] (a) The infringement warranty DOES NOT APPLY to a product furnished by a supplier of the provider. (b) The provider will (i) at the customer's request, provide a copy of any relevant written infringement warranty made to the provider by the supplier, and (ii) to the extent permitted by the supplier's warranty or otherwise agreed by the third party, pass through and/or assign the supplier's warranty to the customer.

202. AGGREGATE LIABILITY

[Opt-in language: Copy and paste the entire section, editing as desired.] **The provider's AGGREGATE LIABILITY for indemnity and defense against infringement claims is limited to X times the amount(s) paid for the accused product.**

— END OF PAGE —

3. Notes

Notes for § 101 Infringement warranty (limited)

Why is this included? This is a fairly-standard infringement warranty, adapted essentially verbatim from the infringement warranty language of [UCC § 2-312\(2\)](#) (which of course applies only to goods).

ALERT: This warranty applies to a product (or service) *as delivered*; guarantees of future non-infringement, as opposed to guarantees of the product's noninfringing condition as delivered, can add years to the warranty liability period – see [this note](#).

Free of the rightful claim: As one article notes, the UCC indemnity warranty language applies by its terms only to “rightful claim[s]” of infringement; the authors remark that courts tend not to require a final judgment of infringement before allowing the customer to invoke the warranty.¹

Notes for § 102 Exception: Combination use

Why is this included? Provider, quite reasonably, doesn't want to be stuck defending an action for inducement of infringement² when it is supplying only a non-infringing component of the allegedly-infringing product or service.

Exception for published user documentation – subdivision (b): This subdivision requires a provider to be responsible for infringement-by-combination IF the provider directed the combination in its *published* user documentation. The reasoning behind the “published” limitation is to avoid creating a disincentive for the provider's tech-support people to try to be helpful when customers call in. Suppose a tech-support representative happened to suggest using the provider's product with other components (“well, you could try doing X”) If the provider were automatically to be on the hook for any resulting infringement, the provider would have a serious incentive to instruct

its TSRs not to offer any help except that which was in the script.³

Notes for § 103 Exception: Patents

Why is this included? For a provider to give a warranty of no patent infringement can be a decidedly non-trivial matter. Unlike the case for copyright infringement and trade-secret misappropriation, patent infringement cannot be avoided simply by doing independent original work. It usually costs a lot of money to commission a patent search, review the results, obtain a clearance opinion from patent counsel, etc.

Should I object? If a provider agreed to delete this provision – in effect, to give a warranty of no patent infringement – the result likely would be a delay in delivery, and possibly an increased price.

Notes for § 104 Exception: Compliance with specifications

Why is this included? This exclusion is adapted from the “hold harmless” language of [UCC § 2-312\(2\)](#) (which applies only to goods); that section provides in part that “a buyer that furnishes specifications to the seller must hold the seller harmless against any such claim [of infringement] that arises out of compliance with the specifications.”

Notes for § 105 Remedy definitions: Depreciation period; stop-use event

Depreciation period – subdivision (a): This term comes into play if the provider must give the customer a refund after a stop-use event in which the customer must “pull the plug” on its use of a putatively-infringing product; see the comments to the Notes for § 107. Customers commonly want as long a depreciation period as they can get, while providers want the opposite. It's not uncommon for parties to agree on a depreciation period that matches the U.S. Internal Revenue Service regulations for depreciating the asset in question; another bench

Judges – subdivision (b)(ii): The word “judges” is used to evoke the [business-judgment rule](#).

Notes for § 106 Remedy: Defense and indemnity

See also the [Indemnities](#) Protocol.

Notes for § 107 Remedy: Modify, license, or refund

Why is this included? This approach seems to be a standard. Except for any necessary switching costs if the customer has to change products, this provision goes a long way toward putting the customer in about the same position it would have been in if it had not bought the product in the first place.

Stop-use event: The remedies of this provision depend on the customer being required to stop its use of the putatively-infringing product. Some aggressive customer negotiators want the right to “pull the trigger” on the remedy if there's even a hint of an infringement claim. That, however, could lead to abuses, for example if the customer wanted a refund from the provider to help finance a switch to another vendor's product for unrelated reasons.

Prorated refund: The refund is prorated because the customer could get an unfair windfall if it were able to use the warranted product for a long time but then get a full refund.

Substitute product: Note the “same functions” phrasing here, which does NOT refer to the substitute product as an “equivalent” — that might give ammunition to the patent owner to claim infringement by the substitute under the “doctrine of equivalents.”

Notes for § 108 EXCLUSIVE REMEDIES

This provision is framed in a box to make it conspicuous, in case that is required under applicable law.

Notes for § 201 Exception: Products not originating with provider

Should I ask for this? This exclusion limits the infringement warranty to products that originate with the provider. The rationale is that the provider may well have little or no control over whether its supplier's components, modules, etc., infringe another party's rights.⁴

¹ See Christopher M. Arena and Chad A. Rutkowski, *Can I Settle Now? Determining the Existence of a “Rightful Claim” of Patent Infringement*, in ABA Section of Litigation, Intellectual Property Litigation, Spring 2010, at 5 ([link](#)).

² See generally this [Wikipedia discussion](#) on inducement of infringement (accessed Aug. 6, 2008).

³ For a funny “take” on scripted technical support calls, see [XKCD comic #806](#).

⁴ See generally Ted Borris, *Indemnification Clauses in Software License Agreements*, in ABA Section of Litigation, Intellectual Property Litigation, Spring 2010, at 1, 21 ([link](#) – requires membership).

Should I object? A customer might want the provider to be a solution provider that stands behind the complete “package,” not just a bundler.

Notes for § 202 Aggregate liability

ALERT: This clause is likely to be contentious. It’s framed in a box to make it conspicuous.

Innovation Ownership

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Definitions

(a) “Covered innovation” refers to an innovation that under this Agreement is, or is to be, owned by a particular party; see also *innovation owner*. (b) “Create” and “creation,” (i) in respect of an invention, trade secret, or idea, refers to the conception or reduction to practice thereof; and (ii) in respect of a work of authorship, refers to fixation of the work, in whole or in part, in a tangible medium of expression. (c) “Innovation” refers to each of the following: (i) an invention, whether or not patentable or patented; (ii) a work of authorship copyrightable in the U.S. or elsewhere, whether or not registered; (iii) an actual or potential trade secret; and (iv) an idea or concept relating to and usable in the business of the innovation owner. (d) “Innovation owner,” in respect of a particular innovation, refers to a party that under this Agreement is entitled to ownership of the innovation, as well as its successors and assigns, if any; see also *covered innovation*. (e) “Innovator,” in respect of a particular innovation, refers as applicable, to (i) the individual(s) who created the innovation, or (ii) one or more parties to this Agreement whose employee(s) created the innovation.

102. Ownership of covered innovations

(a) Covered innovations for which the innovator is not the innovation owner are works made for hire to the extent permitted by law. (b) Subject to any prerequisite conditions stated in this Agreement, the innovator hereby assigns to the innovation owner all rights to exclude others, anywhere in the world, in respect of each covered innovation, that the innovation owner does not and will not own automatically by operation of law. (c) In addition, and subject to the same prerequisite conditions if any, the innovator agrees to assign to the innovation owner, at its re-

quest, any such rights in covered innovations for which subdivisions (a) and/or (b) do not result in the innovation owner’s ownership of such rights. (d) Each innovator under this Agreement will seasonably provide or disclose (as the case may be) all covered innovations to the innovation owner. (e) The innovator will seasonably sign and deliver to the innovation owner such documents as the innovation owner may reasonably request from time to time to confirm, evidence, or effectuate the innovation owner’s ownership, including (for example) domestic- and foreign patent application documents, copyright-registration application documents, and assignments for recordation. (f) IF: The innovator does not comply with subdivision (e) as to any particular document required by that subdivision; THEN: the innovation owner may sign that document in the innovator’s name; the innovator hereby irrevocably appoints the innovation owner as the innovator’s attorney-in-fact solely for that purpose, the appointment and power being coupled with an interest.

103. Cooperation in proceedings

The innovator will provide reasonable cooperation with the innovation owner and its attorneys, at the innovation owner’s request and expense, in any administrative, judicial, or arbitration proceedings relating to or affecting one or more covered innovations.

104. Moral rights

IF: As a matter of law, the innovator retains any so-called moral rights’ or similar rights in a covered innovation; THEN: The innovator authorizes the innovation owner and its licensees, without additional compensation or payments to the innovator: (i) to make any desired changes to any part of that covered innovation; (ii) to combine any such part with other materials; and (iii) to withhold the innovator’s identity in connection with any business- or other actions relating to that covered innovation.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Customer ownership of certain innovations

[Opt-in language: “The customer owns all IP rights in certain innovation created pursuant to this Agreement.”] (a) The customer owns all right, title, and interest in and to any innovation for which the following are true: (i) The innovation is created in the course of performing services pursuant to this Agreement by the provider and/or its subcontractors, if any; and (ii) the innovation is embodied in, and as a practical matter is unlikely to be usable apart from, a deliverable under this Agreement. Each such innovation is referred to here as a *covered innovation*. (b) The provider will ensure that its employees’ and subcontractors’ agreements with the provider are sufficient to comply with this section; the customer is a third-party beneficiary of such obligations to the extent they concern the ownership of covered innovations. (c) The customer’s full payment of all relevant agreed amounts is a prerequisite condition of the customer’s ownership of covered innovations.

202. Provider’s retained rights

[Opt-in language: “The provider retains certain rights in innovations.”] (a) The provider retains the following perpetual, irrevocable, worldwide, royalty-free right to use, distribute, and further develop any and all tools, components, and general knowledge and experience created or developed in the course of performing services pursuant to this Agreement by the provider and/or its subcontractors, if any. (b) The provider may assign and/or sublicense this retained right in its discretion without obligation to the customer.

— END OF PAGE —

3. Notes

Notes for § 101 Definitions

See generally the Manual of Patent Examining Procedure § 2138.04, “[Conception](#)”; § 2138.05, “[Reduction to Practice](#).”

FIXATION; TANGIBLE MEDIUM OF EXPRESSION: See [17 U.S.C. § 102\(a\)](#).

See generally the Wikipedia article, “[Invention](#).”

See generally the Wikipedia article section, “[Authorship](#).”

See generally the Wikipedia article, “[Trade Secret](#).”

Notes for § 102 Ownership of covered innovations

Work made for hire – subdivision (a): **ALERT:**

Under U.S. law, labeling something as a ‘work made for hire’ doesn’t necessarily make it one – see generally [this Wikipedia article](#).

Hereby assigns – subdivision (b): The present-tense “hereby assigns” is important – see the cases cited in [this blog note](#). See also [this Ken Adams note](#) about language choices in this context.

Disclosure of innovations – subdivision (d):

Even if a customer or employer technically owned a provider’s or employee’s innovation, it wouldn’t be able to do much with it (such as further development) without being timely provided information about it.

Notes for § 103 Cooperation in proceedings

Why is this included? Many innovation-related proceedings, especially those involving patent applications and patents, may require (or at least benefit from) the innovator’s participation; this provision sets out the innovator’s agreement to participate – but only at the owner’s request and at the owner’s expense.

Notes for § 104 Moral rights

See generally the Wikipedia article on [Moral rights](#), especially the section on moral rights in [the United States](#).

Notes for § 201 Customer ownership of certain innovations

Should I ask for this? Some customers tend to ask for complete ownership of innovations.

They want not only the right to use innovations, and to further develop them: They also want to preclude anyone else from doing so. Their rationale is usually, “I paid for this, and anyone else who wants to use it should have to pay for it too.” **Should I object?** If you’re a provider, you should definitely consider objecting if a customer demands complete ownership of your innovations (either that or significantly increasing the price you’re offering). ¶ To be sure, there are circumstances in which the customer might have a legitimate need for ownership. In my experience, though, very seldom do customers really need total ownership of deliverables — and it might make much more economic sense for the provider to be the owner. ¶ A possible provider response to such a customer demand: “The pricing I offered was based on my retaining ownership of the underlying intellectual property.”

Notes for § 202 Provider’s retained rights

This retained-rights clause is pretty typical, but it leaves open the possibility of disputes about what things qualify for provider’s use.

Insurance Requirements

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Minimum insurance levels

Any party required by this Agreement to maintain liability insurance (the *insured party*) will maintain at least the following insurance coverages, or such higher coverage(s) as may be agreed in writing, for example in a service agreement's statement of work: *Commercial general liability coverage*, including bodily injury, personal injury, and property damage liability, along with contractual liability coverage for the insured party's indemnity obligations under the contract, if any:

\$1 million. Errors & omissions liability:

\$1 million. Business automobile bodily injury and property damage liability for owned, non-owned and hired automobiles: **\$300,000. Worker's compensation coverage** and employer-liability coverage as required by applicable law (including maritime-related law where applicable) where work is to be performed pursuant to the contract or anywhere else an employee performing such work is normally employed: As required by law. **Employer liability: \$500,000. Excess / umbrella liability: \$2 million.**

102. Minimum policy requirements

All insurance required by this Agreement is to be maintained (1) on an **occurrence** basis; (2) on industry-standard policy forms; (3) with one or more carriers each having an A.M. Best rating of at least **A VIII**; (4) while any transaction pursuant to this Agreement remains in progress and for at least **two years** thereafter; and (5) at the insured party's expense; in addition, all policy limits are to be combined single limit per occurrence.

103. Certificates and endorsements

The insured party will seasonably cause its carriers to furnish the other party with certificates of the insurance and/or endorsements required by this Agreement.

104. Premiums and deductibles

As between the insured party and the other party, the insured party is solely responsible for all premiums and deductibles for insurance required by this Agreement.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Additional-insured endorsements

[Opt-in language: "Additional-insured endorsements are required for **commercial general liability** coverage."] The insured party will cause its carrier(s) to provide the other party with an additional-insured endorsement on industry-standard forms for the specified coverage(s). Each such endorsement must: (1) name, as additional insureds, at least the other party and its officers, directors, employees, shareholders, general- and limited partners, members, and managers; (2) designate the insured party's coverage as primary and non-contributing; and (3) state that the insurance carrier will endeavor to give the other party at least 30 days' prior written notice of any cancelation, non-renewal, or material change in the policy.

202. Additional-insured affiliate coverage

[Opt-in language: "Additional-insured coverage is required for affiliates as well."] Each additional-insured endorsement will also name: (i) the other party's parent company, subsidiary companies, and companies under common control with the other party, if any; and (ii) the officers, directors, employees, shareholders, general- and limited partners, members, and managers of each of the foregoing.

203. Subcontractor insurance

[Opt-in language: "Subcontractor insurance is also required."] The insured party will require its subcontractors (if any) to comply with the insurance requirements of this Agreement.

204. Subrogation waiver

[Opt-in language: "Subrogation is waived."] The insured party, on behalf of itself and its carrier(s), waives all rights of subrogation of any kind against (i) the beneficiary; (ii) all additional insureds, if any; and (iii) the officers, directors, employees, shareholders, general- and limited partners, members, and managers of each of the foregoing who are not additional insureds in their own right.

205. Premium reimbursement

The customer will reimburse the provider for **100% of** all premiums paid for insurance required by this Agreement.

206. Noncompliance

Noncompliance with the insurance requirements of this Agreement (i) is a material breach, and (ii) does not extend the insured party's deadlines under this Agreement.

— END OF PAGE —

3. Notes

Notes for § 101 Minimum insurance levels

Why is this provision included? Insurance provisions almost always specify the items set forth in this section, although the particular coverage requirements will often vary.

What coverages should be required? See generally Jeff Gordon's [Insurance Basics](#) blog for suggestions about coverages (with specific amounts) that a customer might want to request in a services agreement.

Commercial general liability coverage: The old practice of including a long laundry list of specific perils to be insured against is generally thought not to be necessary if an [ISO](#) CGL form is used. As the author of a useful on-line primer explained:

Basically, the CGL coverage form begins by broadly expressing what it covers, and then listing exclusions from that coverage. So the key is to look at the primary promise of insurance in the form's "Insuring Agreement." ...¹

Notes for § 102 Minimum policy requirements

Why is this provision included? Insurance provisions typically specify the items set forth in this section.

Occurrence- or claims-made basis? "The coverage trigger of an occurrence form is bodily injury or property damage that occurs during the policy period"; in contrast, "[t]he coverage trigger of a claims-made form is the making of a claim against the insured during the policy period."²

Carrier ratings: Coverage is often required to be maintained with carriers having at least a stated [A.M. Best](#) rating.

Duration of coverage: The time during which coverage must be maintained will sometimes be a matter to be negotiated. In services contracts, it's not uncommon for coverage to be required at any time services are being per-

formed, at any time the service provider is present at the customer's premises, and for one- to three years thereafter.

Combined single limit: See generally Leland-West Insurance Company, [What is a Combined Single Limit?](#) (accessed Aug. 22, 2007).

Notes for § 103 Certificates and endorsements

Why is this provision included? In litigation, a party seeking the benefits of additional-insured status likely would have to "prove up" that status; an original certificate might well be necessary.

ALERT: It would behoove an additional-insured party to keep its endorsement certificate in a safe place where it can be found.

In [a discussion](#) at the IACCM Web site I came across [a real-world story](#) (it's reply #4) how a contractor's inability to find a subcontractor's insurance certificate ended up costing the contractor significant money. The subcontractor was a painter company. Its employee was hit by a board falling off a scaffold. Eventually he sued the contractor (among others). The subcontractor was supposed to indemnify the contractor against its employees' claims, but the indemnity was basically worthless: apart from a truck, the subcontractor had essentially no assets that could be seized to satisfy the indemnity obligation. ¶ The contractor had obtained an insurance certificate from the subcontractor. But that had been several years earlier. By the time the lawsuit came around, the contractor couldn't find the insurance certificate. Complicating matters, the subcontractor denied ever having had insurance. ¶ End result: The contractor ended up paying "a significant amount" to settle the subcontractor employee's claim. If the contractor had been able to find the subcontractor's insurance certificate, it might not have had to pay anything.

Notes for § 104 Premiums and deductibles

Why is this provision included? A party that requires another party to carry insurance will usually have the bargaining power to require the insured party to pay for all premiums and deductibles.

Notes for § 201 Additional-insured endorsements

Why is this provision included? Insurance provisions commonly require the insured party

to obtain additional-insured coverage for the other party.

Additional-insured basics: Contract drafters can sometimes get confused about the nature and purpose of additional-insured endorsements. These endorsements commonly arise when a party negotiating a contract is concerned that it might be sued by a third party for acts or omissions by the other party. ¶ For example, a customer hiring a contractor to perform services might be concerned that it could be sued by one of its own employees who is physically injured by the contractor's negligence. ¶ Or, the customer might fear being sued by a contractor employee who is injured by negligence of just about anyone — the contractor, a subcontractor, the customer, etc. ¶ Consequently, the customer might negotiate a contract requirement that contractor defend and indemnify the customer against such third-party claims. ¶ But what if the contractor doesn't have the money to make good on this obligation? That's where negotiating for an additional-insured endorsement clause comes in: The customer requires the contractor to name the customer as an additional insured on the contractor's own relevant policies. That way, the odds are greater that at least some money will be available to defend and indemnify the customer from a third-party claim.

Mechanics: An additional-insured endorsement might take the form of a specific line item on the certificate of insurance, as in [this example](#) from the University of California (scroll down to the bottom of page 2). Or, the endorsement might take the form of a separate document.

Primary coverage: Many insurance clauses require additional-insurance endorsements to contain primary-insurance language. This is something that a customer will usually press for: The customer wants to spend the contractor's insurance coverage first, so that its claims history with its own carrier, and thus its premium expenses, will be less likely to take a hit from such a claim. ¶ Customers may want the primary-insurance statement to be included in the endorsement document provided by the insurance carrier, not just in the contract clause between the parties. Otherwise, a court might not enforce the primary-insurance statement; the general but not unanimous rule has been that, even though a contract might state which insurance carrier has primary responsibility, such a statement isn't binding on

¹ Ira Meslik, [A Liability Insurance Primer for the Real Property Lawyer](#) (Apr. 18, 2007; accessed Oct. 25, 2010).

² Chubb Commercial Insurance General Liability Definitions (accessed Aug. 22, 2007).

the carrier without the carrier's agreement.³ ¶ This problem can be handled — and the risk of expensive satellite litigation over insurance coverage reduced — by expressly requiring the primary-insurance language to be included in the additional-insurance endorsement, as in the University of California [example certificate](#) (scroll down to the bottom of page 2).

Notification of changes, etc.: It's generally accepted that that insurance carriers will agree only to an "endeavor" obligation (as opposed to an absolute obligation) to notify additional insureds of policy expirations, cancelations, or modifications; see generally these definitions of [endeavor](#).

Additional-insured endorsements and E&O policies: Not a good fit? Some parties might seek additional-insured coverage under the named insured's professional liability / E&O policy. Their reasoning might be that, if the named insured is negligent in performing services, the additional insureds want to be able to make a claim directly to the carrier, instead of having to go to court. An E&O claim by an additional insured against a primary insured, however, might well be blocked by the "insured versus insured" exclusion found in many such policies. Moreover, there seems to be some opinion in the insurance bar that it's inappropriate and even dangerous for an E&O policy to name customers or other professionals as additional insureds.⁴

Exclusion of additional insured's own negligence? It's possible that a customer's own negligence might not be covered by an additional-insured endorsement. In 2004, an Oregon court held in 2004 that under that state's statutes, an additional-insured endorsement in an insurance policy did not cover the additional insured's alleged negligence. The court upheld a summary judgment that the insurance company did *not* have a duty to defend the

additional insured.⁵ ¶ Moreover, the express-negligence rule applicable in some jurisdictions may prohibit a contractual indemnity from extending to the indemnified party's own negligence unless the indemnity language is explicit on that point (and it may need to be conspicuous as well).⁶

Exclusion of completed operations? An additional-insured endorsement might not cover the insured's completed operations, for example, a contractor's work on a completed project.⁷

Further reading: • Thelen Reid Brown Raysman & Steiner LLP, [Your Additional Insured Endorsements: How Coverage May Be Narrowing](#), (2005) (accessed Apr. 14, 2007) (scroll down to "What the Endorsement Accomplishes" for a general introduction to additional-insured endorsements). • Joseph P. Postel, [How Will Courts Construe ISO's New Additional Insured Endorsements?](#) (2004) (accessed Apr. 14, 2007).

Notes for § 202 Additional-insured affiliate coverage

Should I ask for this? If a party seeking additional-insured coverage has affiliates that might themselves be targets for a third-party claim arising from the insured party's actions (or omissions), the first party might want this provision.

Notes for § 203 Subcontractor insurance

[Reserved]

Notes for § 204 Subrogation waiver.

Should I ask for this? A party negotiating an insurance provision might well want a waiver of subrogation. As explained by one author:

A waiver of subrogation clause is placed in the ... contract to minimize lawsuits and claims among the parties. The result is that the risk of loss is agreed among the parties to lie with the insurers, and the cost of the insurance coverage is contractually allocated among the parties as they may agree. *The risk, once assigned to the insurers by the parties, is determined to stop there, without allowing the insurer to seek redress from the party "at fault."*⁸

Notes for § 205 Premium reimbursement

Should I ask for this? This section might be appropriate if a provider is having to buy extra insurance at a customer's request.

Notes for § 206 Noncompliance

Should I ask for this? In many jurisdictions, if the insured party failed to maintain required insurance coverage, this provision would give the other party the right to terminate the contract, or even to rescind it (assuming the breach was not timely cured under a cure provision).

³ See generally Joseph P. Postel, [How Does an Extrinsic Contract Impact Additional Insured Coverage?](#) (2003) (reviews several court cases in which primary- versus excess coverage was disputed; accessed Apr. 14, 2007); [Can an Indemnity Agreement Determine Who's Primary and Who's Excess?](#) (2002) (accessed Apr. 14, 2007).

⁴ See generally J. Kent Holland, Jr., [Why Project Owners Aren't Made Additional Insureds Under a Design Professional's Errors and Omissions Policy](#), ConstructionRisk.com Report, March 2007 (accessed Aug. 24, 2007).

⁵ See John W. Ralls, [Oregon Court Voids Subcontract's Insurance Provision Because It Would Cover General Contractor's Own Negligence](#) (2004) (accessed Apr. 14, 2007).

⁶ See generally, e.g., Legal Opinions Committee of the Business Law Section of the State Bar of Texas, [Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law](#), (2006) (accessed Apr. 14, 2007).

⁷ See generally Thelen Reid Brown Raysman & Steiner LLP, [Your Additional Insured Endorsements: How Coverage May Be Narrowing](#) (2005) (accessed Apr. 14, 2007) (scroll down to "Ongoing Operations").

⁸ Kenneth A. Slavens, [What is Subrogation . . . and Why Is My Contract Waiving It?](#) (2000; accessed Aug. 22, 2007) (emphasis added); see also the Wikipedia article on [Subrogation](#).

Limitations of Liability

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Definition: Disallowed damages

For purposes of this Protocol: (a) *Disallowed damages* refers to consequential, indirect, special, punitive, exemplary, or similar damages arising out of breach of this Agreement. (b) For the avoidance of doubt, incidental damages are not disallowed damages. (c) Damages “arising out of breach of this Agreement” (i) include damages arising from (A) breach of any warranty or covenant in this Agreement, and (B) the negligent making of any representation in this Agreement, but (ii) do not include damages arising out of fraud or intentional misrepresentation.

102. Broad scope of liability limitations

(a) The parties have specifically agreed that (1) the risks of this Agreement are to be allocated between them as reflected in this Agreement’s limitations of liability, and that (2) such limitations are to apply (i) to all claims for damages, whether alleged to arise in contract, tort, or otherwise, and (ii) even if the allegedly-liable party was advised, knew, or had reason to know of the possibility of *disallowed damages* and/or of damages in excess of the damages cap, if any, and (iii) even if a limited remedy fails of its essential purpose. (b) Each party acknowledges that, without such limitations, one or both parties would not have entered into this Agreement on the economic terms stated in it.

103. Information-damage liability

Without prejudice to any other limitation of liability (for example, an exclusion of disallowed damages and/or a damages cap), *neither party* will be liable for damage that it causes to another party, in the form of erasure, corruption, or other damage to stored information of the other party (including, for example, data and computer program code), TO THE EXTENT that the damage could have been avoided or mitigated by the other party through

the use of prudent practices such as reasonable backups. For the avoidance of doubt, such damage is not deemed tangible damage to property.

104. Agreement not to seek damages beyond the limitation of liability

IF: This Agreement limits a party’s liability for specified damages; THEN: Each other party expressly agrees not to seek damages inconsistent with such limitation(s) of liability from the specified party and / or its *protected persons*.

105. Carve-outs

Damages arising from the following are not *disallowed damages*, nor are they subject to any generally-applicable damages cap that may be provided in this Agreement: (1) personal injury or death resulting from breach of this Agreement; (2) a party’s failure to comply with an obligation stated in this Agreement, if any, to defend and/or indemnify another person against third-party claims — however, a specifically-stated maximum aggregate liability for such defense and indemnity obligations is not considered a generally-applicable damages cap; (3) a party’s infringement of another party’s patent, copyright, trademark, or rights in confidential information; and (4) a party’s conversion of, or infliction of harm to, property of another party that is shown, by clear and convincing evidence, to have been both intentional and wrongful.

106. Savings clause

IF: One or more limitations of liability benefiting a party under this Agreement is held void or unenforceable under applicable law; THEN: That party’s relevant liability is nonetheless to be limited to the greatest extent consistent with that law and this Agreement.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Exclusion of disallowed damages

[Opt-in language: “Exclusion of disallowed damages applies to claims against *either*

party.”] **THE SPECIFIED PARTY OR PARTIES ARE NOT LIABLE FOR *DISALLOWED DAMAGES***, as defined above, except as expressly provided otherwise in this Agreement.

202. Damages cap

[Opt-in language: “**THE DAMAGES CAP FOR CLAIMS AGAINST *EITHER PARTY* IS *THREE TIMES THE AGREED PRICE OF THE RELEVANT TRANSACTION(S)*.**”] (a) Except as expressly provided otherwise in this Agreement, **THE SPECIFIED PARTY WILL NOT BE LIABLE FOR MORE, IN THE AGGREGATE, THAN THE STATED DAMAGES CAP** for damages arising out of breach of this Agreement. (b) For the avoidance of doubt, the damages cap amount is the maximum aggregate liability of the *protected party* (or parties) and its *protected persons* for any and all claims of breach of this Agreement brought by the other specified party or parties and any and all other individuals and organizations claiming through the same.

203. Property-damage liability

[Opt-in language: “Property-damage liability of *the provider* is also limited to *the provider’s* applicable insurance coverage.”] The damages cap for tangible damage to property resulting from any action or omission by the specified party is the lesser of (i) the damages cap amount of this Agreement, and (ii) the specified party’s applicable insurance coverage.

204. Some liability limitations might not apply

[Opt in language: *Same as heading of this section.*] Some jurisdictions might not permit limitation or exclusion of remedies under some circumstances, so some or all of the limitations of liability stated in this Agreement might not apply.

— END OF PAGE —

3. Notes

Notes for § 101 Definition: Disallowed damages

Why is this provision included? To simplify the drafting of a limitation-of-liability provision.

Consequential damages – subdivision (a): A useful review of consequential damages and other types of damages can be found in a May 2008 article by Glenn D. West and Sara G. Duran.¹

Arising out of – subdivision (a): This definition is limited to damages “arising out of,” and not “arising out of or relating to,” breach of the Agreement – the latter might be too broad for a party’s taste, given the difficulty of forecasting just what damages might “relate to” the Agreement.

Incidental damages – subdivision (b): Incidental damages are not included in the definition of disallowed damages. Paraphrasing the UCC, incidental damages are generally defined as reasonable expenses reasonably incurred by a party incident to a breach or delay by another party.²

Negligent misrepresentation – subdivision (c): Note that the term “breach,” for purposes of the limitation of liability, does not include fraudulent misrepresentation, a.k.a. fraud.

Notes for § 102 Broad scope of liability limitations

Notes for § 103 Information-damage limitation

Why is this provision included? For two reasons: (i) Because claims of damage to information can be very hard to refute; and (2) to provide an additional incentive for the parties to use prudent procedures in handling their stored information.

¹ See Glenn D. West and Sara G. Duran, *Reassessing the “Consequences” of Consequential Damage Waivers in Acquisition Agreements*, 63 THE BUSINESS LAWYER 777 (May 2008); see also Foley & Lardner, *Protecting Consequential Damages Waivers in Software License Agreements* (Feb. 27, 2003; accessed Oct. 8, 2010).

² See generally UCC § 2-710 (seller’s incidental damages) and UCC § 2-715(1) (buyer’s incidental damages). Of course, Article 2 of the UCC applies only to sales of goods, but the same basic concepts of incidental damages can also apply to sales of services, etc.

Notes for § 104 Agreement not to seek damages beyond the limitation of liability

Why is this provision included? This subdivision is intended to make it a separate breach of contract for the other party to seek damages not allowed by the Agreement’s limitation(s) of liability. (It’s unclear whether a court would give effect to this language.)

Notes for § 105 Carve-outs

Arising from: Note the use of the phrase, “Damages arising from the following ...,” instead of the broader language, “Damages arising from or relating to the following”

Personal injury or death – subdivision (1): This carve-out is included to avoid possible unconscionability of the limitation of liability under UCC § 2-719(3) (which of course might not apply in a services contract).

Resulting from breach – subdivision (1): This phrase is adapted from UCC § 2-715.

Failure to comply with defense- or indemnity obligation: A party’s failure to comply with a defense- or indemnity obligation could result in serious financial harm to the other party;

Infringement – subdivision (3): If, say, a provider were to misappropriate a customer’s confidential information, the customer almost certainly would not want the damages to be capped at the price it had paid the provider — that might well be tantamount to a get-out-of-jail-free card for the misappropriating provider. ¶ The same would be true in the reverse situation, if a software licensee used the licensed software far beyond the scope of the license without paying for it.

Conversion of property - subdivision (4): This carve-out would encompass, for example, an IT provider’s erasure of a customer’s data, or sabotage or hijacking of the customer’s computer system as “self-help” in a payment dispute. Note the requirement for proof of intent by clear and convincing evidence.

Notes for § 106 Savings clause

[Reserved]

Notes for § 201 Exclusion of disallowed damages

Conspicuousness: This provision is in all-caps bold type to make it conspicuous, which is re-

quired for limitations of liability in many jurisdictions.

Notes for § 202 Damages cap

See the notes above.

Notes for § 203 Property-damage liability

[Reserved]

Notes for § 204 Some limitations might not apply

Why is this provision included? Provisions like this are widely used in agreements that might be entered into by consumers, in case a consumer’s jurisdiction restricts attempting to exclude or limit the provider’s liability.

Marketing Operations

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Applicability of this Protocol; definitions

This Protocol applies when this Agreement provides that a party (the *marketer*) is to market and/or sell one or more products and/or services (the *offering*) of another party (the *provider*).

102. Marketing guidance

The marketer will comply with all reasonable marketing guidance given by the provider in relation to the promotion and advertisement of the provider's offering.

103. Marketing materials

(a) At the marketer's request, the provider will furnish the marketer with copies of its standard marketing materials (for example, instruction books, catalogues, circulars, and other promotional or technical material), of such type(s) as the marketer may determine in its discretion. The provider may invoice the marketer for copies of such marketing materials at provider's then-standard rates. (b) The marketer may cause duplicates of the provider's marketing materials to be made, of the same quality as the originals or as otherwise specified in writing by the provider. (c) The marketer may distribute copies of such marketing materials, solely in connection with its promotion and advertisement of the provider's offering. (d) At the provider's request from time to time, the marketer will supply representative samples of all marketing materials used to promote the provider's offering. The provider may inspect, test, and/or dispose of such samples in its discretion. (e) The marketer will cease using any marketing materials used to promote the provider's offering promptly upon written request from the provider.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Marketing plans

[Opt-in language: "Marketing plans are required *quarterly*."] (a) The marketer will submit a marketing plan, at least 30 days in advance of each calendar quarter, for approval by the provider, not to be unreasonably withheld. (b) Each marketing plan is to set out the marketer's proposed targets and marketing activities for the upcoming period, in such format and including such information as the provider may reasonably specify. (c) The marketer will review its marketing plan with the provider from time to time at the provider's reasonable request.

— END OF PAGE —

3. Notes

Notes for § 101 Applicability of this Protocol; definitions

Notes for § 102 Marketing guidance

ALERT: Too much control over a reseller's or distributor's operations can help make Provider an "accidental franchisor." Providers entering into such agreements should therefore be extremely careful about charging any kind of "fee" (a term that can encompass a lot of economic arrangements), which is usually another element of a "franchise" relationship. An accidental franchise can result in enormous complications and potential civil and/or criminal liability — see [this useful overview](#) by attorney John Tang.

Notes for § 103 Marketing materials

Invoicing for marketing materials – subdivision (a): Invoicing is most likely appropriate when the provider will be furnishing copies in bulk.

Distribution of copies – subdivision (c): Marketing materials will likely be subject to copyright, so the marketer will need permission not just to make copies, but also to distribute them. Here, permission would probably be implied, but this provision makes it explicit.

Samples – subdivision (d): This clause can be a useful element of trademark control to preserve the provider's legal rights in its trademarks; see also the Trademark-Use Protocol.

ALERT: Too much control over a marketer's operations could help make the provider an "accidental franchisor," as discussed in the notes to Section [Notes for § 102](#).

Notes for § 201 Marketing plans

Should I ask for this? A provider might want this provision if the marketer is a reseller or distributor that will be getting a significant price discount.

Provider approval – subdivision (a): **ALERT:** Too much control over a marketer's operations could help make the provider an "accidental franchisor," as discussed in the notes to Section [Notes for § 102](#).

Payments

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Payment terms

(a) Payments required by this Agreement are due **net 30 days in U.S. dollars** after receipt of a correctly-stated invoice.

(b) Payments are to be made by **any method reasonably acceptable to the payee**.

102. Expense reimbursement

(a) This section applies whenever this Agreement specifies that a party will reimburse expenses of another party.

(b) Only reasonable and necessary expenses actually incurred for the stated purpose will be reimbursed. (c) Expenses are to be submitted on a straight pass-through basis with no markups. (d) A party submitting expenses for reimbursement will comply with any reasonable reimbursement policy that the reimbursing party furnishes to the submitting party in writing a reasonable time before the submitting party (i) incurs the expense in question, or (ii) becomes obligated to pay for the expense on a non-refundable basis.

103. Payment disputes

To help the parties manage their accounts receivable, IF: A party wishes to dispute an invoice or any other claim that a stated amount is owed; THEN: The disputing party will (1) timely pay any undisputed portion; and (2) seasonably furnish the payee with a written explanation of its dispute together with (where applicable) reasonable supporting documentation.

104. COD terms after multiple- or significant late payments

In case of multiple- or significant late payments by a party, the other party may, by notice, require COD terms for any subsequent transactions.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Invoices

[Opt-in language: "Invoices are required for payment."] (a) A party believing itself entitled to payment from another party pursuant to this Agreement must submit to the other party a correctly-stated invoice containing reasonable detail. (b) Any such party will submit invoices (i) on such schedule as may be agreed in writing, and/or (ii) as the other party may reasonably request in writing.

202. Electronic invoicing

[Opt-in language: "Electronic invoicing will be used if reasonably requested."] Electronic invoicing will be used if, and in such format(s) as may be, reasonably requested by the payor.

203. Invoice submission deadline

*[Opt-in language: "Invoice submission deadline: **Five business days after the end of each calendar quarter**."]* Invoices submitted after the specified deadline need not be paid unless the law does not permit such a deadline.

204. Advance payments

Advance payments, if any, will be applied as agreed; any remaining balance will be promptly refunded **without interest**.

205. Contingency of payment obligations

[Opt-in language: Use the complete text of this section.] Payment obligations under this Agreement **are not** contingent on the payor's receipt of money owed to it unless expressly agreed otherwise.

206. Interest on past-due amounts

[Opt-in language: Use the complete text of this section.] **Any party entitled to payment under this Agreement** may charge interest at **5% per annum, not compounded**, OR if less, the maximum legal rate, on **amounts more than 30 days past due**.

207. Usury savings clause

(a) This section applies to the extent, if any, that this Agreement requires payment of interest on past due amounts.

(b) The parties intend for any interest charged or paid pursuant to this Agreement, in any contingency, to comply with law. Consequently, IF: One or more charges and/or payments hereunder are properly characterized as interest, and are determined to have exceeded the maximum interest permitted by law (after taking all permitted steps to spread such payments over time); THEN: (1) The excess interest will be deemed the result of an inadvertent error, even if the party charging or paid the excess intended to take the action(s) resulting in the excess; (2) if the excess interest has not yet been paid, then the excess charge will be canceled; and (3) if the excess interest has been paid, then the party that was paid the excess will refund it, or credit it to any balance still owed by the payer, along with interest on the excess at the maximum rate permitted by law.

— END OF PAGE —

3. Notes

Notes for § 101 Payment terms

Why is this provision included? Most contracts involving payment include payment terms, not least so the payer's accounts-payable department will know how long they have to process the payment.

Net 30 days means the entire amount in question is due in 30 calendar days, with no discount for early payment. This seems to be something of a *de facto* standard in the U.S., although purchasers with bargaining power will routinely demand net 45 or even net 60 days.

Payment method – subdivision (b): Alternatives could include, for example: • a check drawn on a bank reasonably acceptable to the payee • a check drawn on a U.S. bank • a cashier's check drawn on a U.S. bank • immediately-available funds, which in the U.S. generally means cash, a wire transfer via the Federal Reserve system ([FedWire](#)), or an Automated Clearing House ([ACH](#)) electronic funds transfer (EFT) transaction to an account specified by the payee.

Notes for § 102 Expense reimbursement

Why is this provision included? Expense reimbursement provisions are very common in, for example, services contracts.

Pass-through basis – subdivision (c): The parties might wish to negotiate other terms, for example a cost-plus reimbursement to cover administrative expenses.

Expense-reimbursement policies: Large corporate customers often demand that their providers comply with the customers' expense-reimbursement policies. The language of this particular reimbursement provision has enough qualifiers in it that it should be acceptable to most providers.

Notes for § 103 Payment disputes

Why is this provision included? If a paying party wants to dispute an amount due, it's only fair that it should timely notify the payee, which has to manage its accounts receivable.

What if it were left out? Chances are that the payee would bug the payor, which eventually would result in the payor informing the payee of the dispute.

Notes for § 104 COD terms after multiple- or significant late payments

Why is this provision included? This express authorization of COD terms could be vital to a supplier faced with a customer's bankruptcy: Otherwise, the customer might insist that the supplier was obligated to continue to ship, even with no realistic prospect of getting paid, and that any refusal by the supplier would violate the Bankruptcy Code's automatic stay.¹

Notes for § 201 Invoices

Should I ask for this? For accounting purposes, customers often want their payments to be tied to invoices stating the amounts owed. For on-going projects, the customer might want it agreed that invoices would be rendered on a "Goldilocks" schedule: not too often (because it takes the payor a certain amount of work and expense to process and pay an invoice), but not too seldom either (because payors don't like unpleasant surprises in the form of one huge invoice reflecting months of unbilled charges). **Should I object?** A party that's owed money will usually be more than happy to generate and send an invoice if that's what it takes to get paid.

Notes for § 202 Electronic invoicing

Should I ask for this? A customer or client might have switched — or be planning to switch — to electronic invoice processing: This section could position the customer or client to request electronic invoices. **Should I object?** Requiring both parties to sign a transaction order may be a pain for vendors, but some customers might want it for extra assurance that the transaction is in accordance with the Agreement.

Notes for § 203 Invoice submission deadline

Should I ask for this? Late invoices can cause accounting problems for the payor, potentially including having to restate its earnings for the period covered by the invoice.² **Should I ob-**

¹ See generally John T. Gregg, [Adequate assurance under section 2-609 of the Uniform Commercial Code upon a customer's bankruptcy filing](#) (accessed Sept. 21, 2009).

² In 2006, the general counsel of Calgon Carbon Corp. was [fired](#), apparently because he had failed to timely process some \$1.4 million of invoices, causing his employer to have to restate three fiscal quarters' worth of financial statements.

ject? A provider or other payee might have a hard time generating invoices in time to meet a too-short customer deadline.

Notes for § 204 Advance payments

[Reserved]

Notes for § 205 Contingency of payment obligations

Should I ask for this? This clause can be useful — and perhaps even crucial — in, for example, reseller agreements where an acquiring party is to serve as a reseller of a provider's goods or services. The clause makes it clear whether the acquiring party's payment obligation is not contingent on the acquiring party itself getting paid. If this contingency is not expressly negated, it's possible that generally accepted accounting principles (GAAP) might not permit the provider to recognize the revenue until the provider gets paid by the acquiring party. **Should I object?** Some prospective payees may have a problem with allowing the payor to take an offset against amounts owed, because (i) the parties may disagree about what is truly owed, and/or (ii) an offset could cause cash-flow and revenue-recognition issues for the payee.

Notes for § 206 Interest on past-due amounts

Should I ask for this? A provider might want to try to negotiate interest charges for late payments, on the theory that the provider is not in the (sometimes-risky) business of making interest-free loans to its customers.

Should I object? The customers often flat-out refuse to agree to pay interest on late payments — sometimes on top of demanding 60- or 90-day payment terms. In effect, these customers are asking their vendors to finance their business operations.

ALERT – interest rate: Check with counsel before specifying a higher interest rate — violation of a usury law can have grave consequences, possibly including criminality. **Interest start date:** Some jurisdictions restrict charging interest until the debt is at least 30 days past due.

Notes for § 207 Usury savings clause

Should I ask for this? If you're going to be charging interest, you might well want this, because state usury laws can have real teeth,

including forfeiture of principal and perhaps
even criminal penalties.

Personnel Matters

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Personnel responsibility and authority

Except to the extent (if any) otherwise agreed, as between the parties, **each party** (the *employer*) will have sole responsibility, and sole authority, for all personnel-management matters, of any nature, relating to its own employees. This responsibility and authority extend, for example, to the following: (1) recruiting; (2) compensation; (3) withholding required by law, if any; (4) determining the means and manner in which the employees perform their work; and (5) supervision of the employees.

102. No entitlements from the other party

For the avoidance of doubt, neither a party nor its officers, directors, employees, or subcontractors, if any, are entitled to participate in any benefit program that may be offered by the other party to its employees, if any, such as (for example) retirement- and stock-option programs.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Personnel agreements

*[Opt-in language: "Suitable written agreements with employees, etc., are required for **each party**."] Each specified party, to the extent necessary for performance of its obligations under this Agreement, will maintain appropriate written agreements with its relevant personnel (for example, employment- or contractor agreements with suitable confidentiality- and invention-assignment provisions).*

202. Personnel-management indemnity

*[Opt-in language: "Personnel management indemnity obligations apply to **each party**."] (a) The specified party will defend*

*and indemnify the other party and its **protected persons** from any and all third-party claims —including for example claims by the indemnifying party's personnel and/or by government agencies — arising from or relating to the indemnifying party's policies, practices, actions, and omissions concerning its internal personnel management. (b) Examples of such claims include those arising from or relating to (1) the indemnifying party's (i) recruiting activities, including for example background checks and other personnel screening; (ii) payment of wages and other compensation and its provision of employment benefits; (iii) withholding, reporting, and remitting of employment-related taxes; (iv) employment practices; and/or (2) workplace injuries suffered by the indemnifying party's personnel, including but not limited to injuries resulting in death.*

203. Background checks

*[Opt-in language: "Background checks on **provider** personnel can be required for access to certain **customer** premises, equipment, or information."] (a) If so requested by the other party, the specified party will cause to be conducted, at its own expense, reasonable background checks, completed within the **12 months** immediately preceding the request, as follows.*

*(b) Background checks are required on all of the specified party's employees and subcontractor personnel, if any, who engage in any of the following **restricted activities**, defined as (i) working on-site at the requesting party's premises, and/or (ii) having access to the requesting party's equipment or confidential information, and/or (iii) interacting with the requesting party's customers. (c) All background checks are to be conducted in accordance with applicable law, including for example (i) any applicable privacy laws and (ii) any applicable pre-decision and/or post-decision notification requirements, for example, in credit-reporting laws, in respect of information learned in any such background check. (d) Absent the specific approval of the requesting party, the*

*specified party will not assign any individual to perform restricted activities if **his** background check indicates that **he** has been arrested for, convicted of, or pled guilty or no contest to: (i) a felony, or (ii) a misdemeanor involving fraud or moral turpitude.*

204. Background-check indemnity

*[Opt-in language: "The background-check indemnity obligation applies."] A party required by this Agreement to conduct background checks will defend and indemnify the other party against any and all third-party claims — including but not limited to claims by government agencies and/or private individuals — arising from the conduct of such background checks. The obligations of this section are referred to as the **background-check indemnity** or as the **background-check indemnity obligation**.*

— END OF PAGE —

3. Notes

Notes for § 101 Personnel responsibility and authority

Why is this provision included? Most of the time this provision probably won't be needed, but it can provide at least some protection if a party tries to excuse its faulty performance (or lack of performance) by shifting the blame to the other party. (Large companies with deep pockets, especially, sometimes want their contracts to be very explicit that their contractors bear full responsibility for supervision, etc., of their own employees.)

Notes for § 102 No entitlements from the other party

Why is this provision included? Contractors have been known to claim that they were really employees and therefore were entitled to overtime, stock options, etc. **ALERT:** This provision (or any other) might not be enough to conclusively exclude individuals from being deemed "employees" of a company.¹

Notes for § 201 Personnel agreements

Should I ask for this? Some customers like provisions of this nature to give them comfort that their providers have their act together.

What if it were left out? Employment law might already impose the necessary obligations on employees, but a party might be using independent contractors or other non-employee personnel.

Notes for § 202 Personnel management indemnity

See also the [Indemnities Protocol](#).

Notes for § 203 Background checks

Should I ask for this? Customers sometimes ask for background checks when provider personnel will have access to important- or sensitive facilities, equipment, information, etc. This

can be especially true if the customer is a government contractor; if it deals with sensitive information; or if the provider's personnel will "face" the customer's own customers. This section lays out basic ground rules for such background checks. **Should I object?** Contractors sometimes object to background-check requirements on grounds that they're burdensome. Basic online criminal records checks, however, seem to be available from any number of Web sites at low cost. (I've never personally used any such site; background checks were always something the HR department took care of.)

Comment: It's entirely possible that, due to the nature of the industry (e.g., technology consulting services), the contractor might have already had background checks performed on its relevant people.

Compliance with law – subdivision (c): This provision is included: (i) to remind drafters and parties of privacy laws protecting employees and consumers, including for example the Fair Credit Reporting Act,² and (ii) to give the other party a contractual remedy — not to mention a certain amount of political cover — in case the party required to conduct background checks violates the law in doing so. ¶ Privacy being the hot button that it is at this writing (fall 2010), if a party violated the law in doing background checks, the other party might find itself targeted by some or all of: • plaintiffs' lawyers looking for any available deep pockets; • law-enforcement officials who, for a variety of reasons, might be looking for a make an example out of someone; and/or • journalists in search of a story.

ALERT – adverse information – subdivision (d): A blanket prohibition against using personnel with criminal records could have a disproportionate impact on racial- or ethnic minorities and thus might be illegal in the U.S., according to the EEOC. It has been reported that (as of August 2010) the EEOC has been stepping up its enforcement efforts against practices that have the effect of discriminating against African-Americans and Hispanics. ¶ Some states may restrict an employer's ability

to rely on criminal background information in making employment-related decisions. Drafters should pay particular attention to the law in New York, Massachusetts, Illinois, and Pennsylvania (not necessarily an exclusive list).

Notes for § 204 Background-check indemnity

Should I ask for this? A customer might well want its providers to take full responsibility for their background checks ("leave us out of it"), or vice versa. **Should I object?** Possibly — the party being asked to provide the indemnity might not want to be responsible for the other party's defense costs.

¹ See generally *Is Your Independent Contractor Really Your Employee?*, by Jeremy R. Sayre (2007; accessed Oct. 3, 2008); *Employee or Independent Contractor? The Implications of Microsoft III*, by Dennis D. Grant of Arter & Hadden LLP (2000; accessed Oct. 3, 2008); see also the Fifth Circuit's "economic realities" analysis in, e.g., *Hopkins v. Cornerstone America*, No. 07-10952 (Oct. 13, 2008) (affirming summary judgment of employee status).

² See generally Paul L. Myers, *Are Your Background Check Policies Making Your Company a Target for a Class Action Lawsuit?*, in Strasburger & Price Labor & Employment Newsletter, Sept. 30, 2010, p.1 (accessed Oct. 16, 2010). See also the [Privacy Rights Clearinghouse FAQ sheet](#) with general information that may be useful.

Privacy

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Definitions

(a) The terms *nonpublic personal information* and *consumer* are defined in the Gramm-Leach-Bliley Act, 15 USC § 6801 et seq., and its implementing regulations, referred to collectively as *GLBA* unless the context indicates otherwise. (b) *PHI* refers to *protected health information* as defined in the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations, referred to collectively as *HIPAA* unless the context indicates otherwise. (c) *Receiving party* refers to a party that itself, or whose agent or subcontractor (if any), takes any of the following actions in respect of nonpublic information and/or protected health information: (1) receives such information from a *disclosing party*; (2) creates such information for or on behalf of a *disclosing party*; and/or (3) collects such information by or on behalf of a *disclosing party*.

102. GLBA confidentiality obligation

The receiving party will: (a) maintain the confidentiality of any nonpublic personal information provided by the disclosing party or that the receiving party accesses pursuant to this Agreement; (b) not use nonpublic personal information other than to carry out the purposes for which it was disclosed to the receiving party, or as permitted by any applicable exception under the Act; (c) not disclose, directly or through its affiliate, such nonpublic personal information to any other person that is a nonaffiliated third party of both the disclosing party and the receiving party, unless such disclosure would be lawful if made directly to such other person by the disclosing party; (d) implement and maintain a security program that (i) is designed to protect nonpublic personal information against unauthorized access, use, or disclosure, including for example

in the form of “identity theft”; and (ii) includes, at a minimum, such measures toward that end as are required by prudence and/or by law; (e) promptly notify the disclosing party of: (i) any actual or suspected unauthorized access, use, or disclosure of nonpublic personal information provided by the disclosing party, and/or (ii) any request for access to such information by a governmental- or non-governmental third party; (f) cooperate with the disclosing party in a reasonable manner in case of any actual or anticipated litigation or regulatory inquiry or action concerning the nonpublic personal information provided by the disclosing party.

103. GLBA inspections

(a) The disclosing party will have the right, during normal business hours upon reasonable advance notice, to inspect the receiving party's policies and practices for preserving the security of nonpublic personal information disclosed pursuant this Agreement (referred to collectively as the receiving party's “*GLBA practices*”). (b) The receiving party will cooperate with the disclosing party in a reasonable manner in any inspection of the receiving party's GLBA practices. (c) The disclosing party will maintain in strict confidence all non-public information about the receiving party's GLBA practices and will contractually require any third-party inspector to do the same.

104. HIPAA- and Privacy-Rule compliance

The receiving party will: (a) not use or further disclose PHI other than as provided by this Agreement or as required by law; (b) use appropriate safeguards to prevent use or disclosure of PHI other than as provided by this Agreement; (c) report to the disclosing party any use or disclosure of PHI not provided by this Agreement of which it becomes aware; (d) ensure that its relevant agents, including for example subcontractors (if any), agree to the same restrictions and conditions that apply to us with respect to PHI; (e) make PHI available for amendment, and incorporate

amendments into the PHI, in accordance with 45 CFR § 164.526; (f) make PHI available as required to provide an accounting of disclosures in accordance with 45 CFR § 164.528; (g) make its internal practices, books, and records — to the extent that they relate to the use and disclosure of PHI — available to the secretary of the Department of Health and Human Services for the purpose of determining the disclosing party's compliance with the HIPAA privacy rule.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

[Reserved]

— END OF PAGE —

3. Notes

Notes for § 101 Definitions

Further reading: • The Wikipedia articles on the [Gramm-Leach-Bliley Act](#) and [HIPAA](#);
• The [Dept. of Health and Human Services Web site](#), especially the [statutory definitions](#) and [45 CFR § 164.501](#).

Notes for § 102 GLBA confidentiality obligation

Identity theft: At this writing (September 2010) the FTC has been delaying the implementation of the controversial Red Flags Rule, which requires not only “financial institutions,” but also many “creditors” — defined broadly — to establish protections against identity theft. Drafters should check whether the Rule has gone into effect and consult with counsel as to how it might affect their clients. See generally the [FTC fact sheet](#) on the Red Flags Rule.

Notes for § 103 GLBA inspections

[Reserved]

Notes for § 104 HIPAA- and Privacy-Rule Compliance

ALERT: This clause represents a set of lowest-common-denominator obligations for a business-associate agreement. Drafters whose clients might be subject to the HIPAA Privacy Rule and/or the HITECH Act should definitely consult counsel.

ALERT: HITECH Act implications: In February 2009, Congress enacted the Health Information Technology for Economic and Clinical Health (HITECH) Act, which among other things “requires HIPAA covered entities to notify affected individuals and requires business associates to notify covered entities, following the discovery of a breach of unsecured protected health information.”¹

¹ See Dept. of Health and Human Services, [Guidance Specifying the Technologies and Methodologies ...](#)

Relationship Preservation

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Senior representatives

(a) If so requested by another party, **each party** will designate, by notice to the other party, a senior representative having the authority and duty to act as the designating party's primary representative and contact point for the other party under this Agreement. (b) Any communication concerning this Agreement by such a senior representative to the other party is binding on the party that designated the senior representative.

102. Status review conferences

(a) Status-review conferences will be held at **either party's** reasonable request, by phone or in any other manner agreed by the parties. Conference details will be arranged by the requesting party unless otherwise agreed. (b) The parties anticipate that status-review agendas will typically include discussion of one or more of the following "G-PP-AA factors": (i) goals; (ii) progress to date; (iii) problems encountered or anticipated; (iv) action plans for the future; and (v) assumptions being made. (c) The requesting party will seasonably circulate draft written minutes upon request; any participating party may object to the contents of draft minutes by seasonably so advising all other parties in writing.

103. Escalation

(a) Whenever requested by either party, the parties will jointly refer any disagreement between them to their respective higher management levels, including executive-level management where appropriate. (b) In the interest of avoiding satellite litigation, neither party will be liable, for breach of contract or otherwise, for any alleged failure to appropriately escalate a dispute, in and of itself.

104. Early neutral evaluation

IF: A dispute between the parties, arising out of or relating to this Agreement or any

transaction or relationship arising from it, becomes the subject of an actual or reasonably-anticipated lawsuit, arbitration, or other action before a tribunal of competent jurisdiction; THEN: At the request of either party, the parties will submit the dispute to **nonbinding** early neutral evaluation in accordance with the Early Neutral Evaluation procedures of the American Arbitration Association.

— END OF PAGE —

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

[Reserved]

3. Notes

Notes for § 101 Senior representatives

Why is this provision included? This section can sometimes be useful in situations where one party is concerned that the other side is a faceless bureaucracy in which no one is willing to make a decision or accept responsibility.

Notes for § 102 Status review conferences

Why is this provision included? Regular scheduled status-review conferences can be an important tool in helping to avoid problems and disputes. (It's often extremely helpful to hold such a conference immediately after a missed deadline or other potential breach.). Some of the non-mandatory language is included mainly to reassure the parties that status-review conferences won't be expensive or burdensome.

Reasonable request – subdivision (a): If neither party ever asks for a status-review conference, none is required.

Typically include – subdivision (b): This language intentionally doesn't mandate any particular agenda (but it does include some suggested agenda items as a useful reminder).

G-PP-AA FACTORS – subdivision (b): The acronym G-PP-AA is a helpful reminder of subjects that ought to be discussed, even if only briefly:

- **Goals:** What are we trying to achieve in this project or relationship, and why? [In some circumstances, Toyota's famous [Five Whys](#) drill-down analysis might be helpful.]
- **Progress:** What have we accomplished so far in achieving the goal(s)?
- **Problems encountered or anticipated:** What if anything has gone wrong, and why? What could go wrong in the future? [The Five Whys might be helpful here, too.]
- **Action plans for the future:** What is going to be done, by whom, when, to continue progress, and/or to address problems?
- **Assumptions:** What are we implicitly or explicitly assuming, that might not be true?

Written minutes – subdivision (c): Written minutes of status-review conferences — especially those containing specific to-do assignments — can be an important project-management tool. They can also help reconstruct what happened if things go wrong.

Notes for § 103 Escalation

Why is this provision included? If one party's 'guy' balks at escalating a disagreement, the other party can respond, "are you going to get your boss involved like the contract says, or does our lawyer need to call yours about breach?"

Notes for § 104 Early neutral evaluation

Why is this provision included? I'm becoming convinced that most business contracts should include an early-neutral-evaluation (ENE) clause that can be invoked **before** litigation begins, or at least before it gets going seriously. After the lawyers get into gear, ENE may well be too late to do any good, not least because the lawyers on both sides might have an economic incentive to keep litigating until just before trial. ¶ When a contract dispute starts to get serious, an early, confidential, non-binding "sanity check" from a knowledgeable neutral can help the parties and lawyers get back onto a more-productive track, before positions harden and business relationships suffer, not to mention before the legal bills start to mount up.¹

The U.S. District Court for the Northern District of California — which encompasses Silicon Valley — points out (at <http://bit.ly/857QgY>) that the goals of early neutral evaluation include "provid[ing] a 'reality check' for clients and lawyers"; the court notes that in an ENE proceeding:

- "The evaluator has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms."
- "The parties' formal discovery, disclosure and motion practice rights are fully preserved."
- "The confidential evaluation is non-binding and is not shared with the trial judge."
- "The parties may agree to a binding settlement."
- "If no settlement is reached, the case remains on the litigation [or arbitration, if applicable] track."

My Web research indicates that a number family-law courts are also using ENE procedures in contested divorce- and child-custody cases.

The American Arbitration Association's ENE procedures are available at the [AAA Web site](#).

¹ For a useful exploration of the pros and cons of ENE, see the 1997 article, "[Neutral Evaluation – An ADR Technique Whose Time Has Come](#)," by John Blackman. (Of course, the fact that ENE is not more widely used could be evidence that its time has *not* come)

AAA involvement in a consultation with a neutral would entail an administration fee (\$500 per party when I last checked) in addition to the neutral's fee. The parties might prefer to avoid this expense by administering the ENE themselves, but many practitioners have found that having a neutral administrator is often well worth the money.

The AAA procedures contain evidentiary provisions analogous to [Rule 408](#) of the Federal Rules of Evidence. The rule provides (with certain limited exceptions) that communications made in the course of settlement discussions are inadmissible in court. (So, too, do many counterpart state-law rules.) The rationale is that parties are likely to be more candid in settlement discussions if they don't have to worry about having a carelessly-worded comment quoted back to them by opposing counsel in front of a judge or jury.

For additional ENE reading, see, e.g.:

- Sandy Gage, Early Neutral Evaluation – panacea or pitfall? (Jan. 2007), at <http://bit.ly/525KOb>;
- the American Arbitration Association's Early Neutral Evaluation: Getting an Expert's Opinion (2005), at <http://bit.ly/7uKOHb>;
- the Association for Conflict Resolution's list of ENE resources at <http://bit.ly/8i9GWy>.

Reseller Operations

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Pricing to reseller

The reseller is entitled to discounts on, or promotions or particular pricing for, products and/or services of the provider, only if (i) the parties expressly agree so in writing, in this Agreement or elsewhere, or (ii) the provider so determines in its business discretion.

102. Changes to list pricing

For the avoidance of doubt: (a) The provider may change its list pricing from time to time, in its sole discretion, by giving at least **30 days** prior written notice to the reseller; (b) Pricing changes will not apply to fully-completed transactions, but will apply to pending transactions except as otherwise agreed.

103. No deceptive or illegal practices by reseller

(a) The service provider will cause all services to be performed, at a minimum, in a *workmanlike* manner in accordance with the applicable statement of work. (b) As used in this provision, *workmanlike* refers to performance that is skillful; competent; well-executed; worthy of a good worker in the relevant field of endeavor; but not necessarily outstanding or original.

104. No unauthorized reps or warranties

(a) The reseller has no authority to, and will not, (i) make any representation on behalf of the provider, nor (ii) offer any warranty or modification of a warranty on behalf of the provider, without the provider's express written authorization in either case. (b) For the avoidance of doubt, the reseller may furnish prospective customers with written and/or graphic materials that are either (i) furnished by the provider, or (ii) authorized in writing by the provider for use by the reseller in promoting sales.

105. Infringement of third-party rights

(a) IF: The reseller becomes aware of any potential infringement, by the provider's products or services, of third-party intellectual property rights; THEN: The reseller will promptly advise the provider. (b) For the avoidance of doubt, this provision neither requires the provider, nor authorizes the reseller, to take any particular action in respect of, or in response to, such a report.

106. Government contracting

The reseller will not obligate the provider to the U.S. Government, as a subcontractor or otherwise, nor will the reseller make any related representation, warranty, or certification on the provider's behalf, without the provider's express prior written consent.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Reseller sales-forecast reports

[Opt-in language: Copy and paste the entire provision, editing as desired.] The reseller will send a sales-forecast report to the provider approximately **10 days before the end of each calendar month**, in such form as the provider may reasonably prescribe from time to time.

202. Reseller use of provider's licensable products

[Opt-in language: "The reseller may use the provider's licensable products solely for customer demos and customer- and internal training."] (a) This section applies if the reseller will be engaging in sales and/or marketing of software or other "*licensable products*" whose use requires a license from the provider under copyright law or other intellectual-property law. (b) The reseller may use the provider's licensable products, at no charge, solely (i) for demonstrations for prospective customers, and (ii) for training of customers and of the reseller's own personnel in the use of licensable products. (c) Otherwise, the reseller will not use any licensable

product of the provider in any manner unless the reseller has obtained the appropriate license(s) from the provider. Uses that are prohibited if unlicensed include, for example, production use for the reseller's own benefit and service-bureau use for the benefit of any reseller customer.

203. No reseller reverse engineering, etc., of provider's products

[Opt-in language: Same as the heading of this provision.] The reseller will not copy, disassemble, decompile, or reverse engineer any product of the provider, nor assist or knowingly permit others to do so, unless the provider gives its prior written consent.

204. Provider is free to deal with others

[Opt-in language: Same as the heading of this provision.] For the avoidance of doubt, the provider may offer products and/or services to others at pricing or on agreement terms that may be more favorable than that offered to the reseller, without obligation to the reseller.

205. Reseller indemnity obligation

[Opt-in language: "Reseller indemnity obligation applies."] The reseller will defend and indemnify the provider against all claims arising from: (1) the reseller's alleged engaging in deceptive or illegal practices, and/or (2) the reseller's operation of its business, other than as to matters for which this Agreement expressly makes the provider responsible.

— END OF PAGE —

3. Notes

Notes for § 101 Pricing to reseller

[Reserved]

Notes for § 102 Changes to list pricing

[Reserved]

Notes for § 103 No deceptive or illegal practices by reseller

Why is this provision included? This provision sets up a possible provider remedy against the reseller if the latter goes “out of bounds” in its sales efforts.

Further reading: See the commentary to the [Indemnities Protocol](#).

Notes for § 104 No unauthorized reps or warranties

Why is this provision included? This provision makes it clear (and reminds the reseller) that the reseller has no authority to expose the provider to possible additional legal liability without the provider’s prior approval.

Further reading: See the [commentary](#) to the independent-contractor provision in the Business Operations Protocol.

Notes for § 105 Infringement of third-party rights

Why is this provision included? The sooner a provider knows about a potential IP threat, the better for both the provider and the reseller.

Notes for § 106 Government contracting

Why is this provision included? Selling goods and services to the U.S. Government should be approached with caution. The government’s [Business.Gov Web Site](#) at <http://bit.ly/71DK07> is one place to start reading.

Notes for § 201 Reseller sales-forecast reports

Should I ask for this? A provider would normally welcome sales-forecast reports from its resellers. **Should I object?** A resellers might not want to undertake this burden – and might not want to share its customer information with the provider.

Notes for § 202 Reseller may use provider’s licensable products for training and demos only.

SOLELY: It could be short-sighted for the provider to allow the reseller to use the provider’s offerings only for demos and internal training. It could be to the provider’s advantage to have the reseller be able to tell prospective customers that the reseller is itself a happy customer.

Notes for § 203 No reseller reverse engineering, etc., of provider’s products

Should I ask for this? This provision likely would apply mainly to providers that are in the software business. **Should I object?** A reseller could find that this provision impedes its ability to provide customer support for its customers.

Notes for § 204 Provider is free to deal with others

ALERT: This could be a “don’t kick a sleeping dog” provision: Its presence in a provider draft might prompt the reseller to ask for a most-favored-reseller clause, which at a minimum could be a pain in the neck for the provider to administer.

Notes for § 205 Reseller indemnity obligation

See also the [Indemnities Protocol](#) and its commentary.

Services

EXCEPT TO THE EXTENT, IF ANY, THAT THIS AGREEMENT STATES OTHERWISE:

1. Standard provisions

101. Statements of work

(a) The service provider is obligated to provide services to the customer only to the extent set forth in any written statement(s) of work that may be agreed to in writing by the parties, each in its *business discretion*. (b) As used in this Agreement, a *statement of work* is any written document (or any group of related written documents), possibly including this Agreement or an attachment to it, that (i) is signed or otherwise clearly agreed to in writing by the parties, and (ii) states the parties' agreement that the provider will perform specified services pursuant to this Agreement. (c) For the avoidance of doubt, each agreed statement of work is a separate contract. (d) A written change order, agreed to in writing by the parties, is required to amend a statement of work, including for example making any change to the provider's obligation to provide services or to the other party's obligation to provide compensation for services.

102. Third-party approvals

(a) Subject to subdivision (b), **the provider** is responsible for obtaining any permit, license, consent, permission, and the like, that may be required, by law or as a practical matter, for the provider's performance of services. (b) **EXCEPTION:** The provider is responsible for obtaining a license or other covenant not to sue, under a third party's patent, copyright, trade-secret right, trademark right, or other intellectual property right, only: (i) if the statement of work so specifies; OR: (ii) if and to the extent that the provider warrants noninfringement to the other party as to intellectual property rights of that kind (for example, a warranty of no copyright infringement for deliverables).

103. Performance standard

The service provider will cause all services to be performed, at a minimum, in a

workmanlike manner in accordance with the applicable statement of work. As used in this provision, *workmanlike* refers to performance that is skillful; competent; well-executed; worthy of a good worker in the relevant field of endeavor; but not necessarily outstanding or original.

104. Compliance with law

In performing its obligations under this Agreement, the provider will comply with all requirements of applicable law.

105. Pollutants, computer viruses, etc.

The service provider will take prudent measures to guard against introducing harmful agents into the customer's business environment(s), for example pollutants and computer viruses.

106. Customer's rights in deliverables

(a) The customer has the right, under any and all intellectual-property rights owned or otherwise assertable by the provider, to utilize in its business, as it sees fit, any and all items required to be delivered by the provider pursuant to a *statement of work* (each, a *deliverable*). (b) Any modification or further development of deliverables by or on behalf of the customer is subject to the provider's applicable intellectual-property rights, if any.

107. Provider's ownership

For the avoidance of doubt, the provider retains ownership of any and all inventions, trade secrets, works of authorship, and other ideas that it may create in performing its obligations under this Agreement, **SUBJECT TO** the customer's rights in (i) deliverables pursuant to this Agreement, and (ii) the customer's own confidential information and other intellectual property.

108. Compensation for services

(a) The provider's sole compensation for services performed under this Agreement will be (i) as stated in the statement of work, or if the statement of work is silent, **at the provider's standard billing rates, as in effect at the time the services are performed, for time actually worked**; and (ii) reimbursement of reasonable and necessary expenses actually incurred in

performing the agreed services. (b) The provider may at its option bill for reasonable and necessary travel time at **100%** of provider's regular rate(s), but only to the extent such time is not spent doing work for persons other than the customer.

109. Staffing of provider's work

(a) The provider will consult with the customer, at the customer's reasonable request, about any significant staffing issues that may arise in the course of the provider's work for the customer pursuant to this Agreement. (b) For the avoidance of doubt, as between the provider and the customer, the provider retains final authority over, and responsibility for, all decisions concerning staffing of the provider's work pursuant to this Agreement.

110. Transfer of work-in-progress upon termination for breach

(a) This section applies only in the following cases: (i) if the customer, pursuant to this Agreement, terminates a statement of work **for material breach by the provider**, or (ii) in any other circumstances specified in the statement of work. (b) If the customer so requests in writing, the provider will transfer, to the customer or its designee, any and all undelivered *deliverables* — both completed and in-progress — referred to collectively as *work-in-progress*. (c) The provider need not transfer work-in-progress if the customer itself is in material breach of this Agreement. (d) The customer **will** reimburse the provider for reasonable out-of-pocket expenses actually incurred in transferring work-in-progress.

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

201. Electronic signatures are permitted.

[Opt-in language: Same as the heading of this provision.] For the avoidance of doubt, electronic signatures **are** permitted for statements of work and change orders; such signatures may take the form

of, for example, an exchange of emails between individuals having authority to bind the parties.

202. All necessary tasks are implied.

[Opt-in language: Same as the heading of this provision.] For the avoidance of doubt, each statement of work is deemed to implicitly require that the provider perform all individual tasks necessary for the proper performance of the services described in the statement, even if one or more of such individual tasks is not expressly set out there.

203. Each statement of work is a separate contract.

[Opt-in language: Same as the heading of this provision.] For the avoidance of doubt, each agreed statement of work is a separate contract.

204. Oral requests may require a written change order.

[Opt-in language: Same as the heading of this provision.] For the avoidance of doubt, the provider reserves the right to require that oral requests by the customer, not already covered by an existing statement of work, be supported by a mutually-agreed written change order.

205. Customer assumes responsibility for disagreements about required third-party approvals.

[Opt-in language: Same as the heading of this provision.] IF: The provider reasonably takes the position that a particular third-party approval may be necessary for the provider to perform the services; BUT: The customer states in writing that, in its view, the approval is not required; THEN: (i) The provider will not be in breach if it declines to proceed with performing the relevant aspect of the services; BUT (ii) IF: the provider elects to proceed without the third-party approval; THEN: the customer will defend, indemnify, and hold harmless the provider and its *protected persons* from any claim arising from the provider's doing so.

206. Rights in deliverables are conditioned on payment.

[Opt-in language: Same as the heading of this provision.] The customer's rights in deliverables pursuant to this Agreement are conditioned on its payment of any amounts required by the applicable statement of work for the relevant deliverable(s).

207. Service-bureau use of deliverables requires provider's approval.

[Opt-in language: Same as the heading of this provision.] Absent written approval by the provider, the customer's right to utilize *deliverables* does not extend to using them in providing services to or for third parties if such services are comprised substantially of functions performed by one or more deliverables.

208. Customer has certain rights to assign its rights in deliverables.

[Opt-in language: Same as the heading of this provision.] The customer may assign its rights in a *deliverable* under this Agreement (subject to all restrictions on those rights) (a) in connection with a sale or other disposition of: (i) a deliverable that is a physical object; and/or (ii) substantially all the assets of the customer's business **in which the deliverable is used**, and/or (b) with the provider's prior written consent, **not to be unreasonably withheld**.

209. Reasonable staffing-stability efforts are required.

[Opt-in language: Same as the heading of this provision.] The provider will make the specified efforts to maintain staffing stability in its work pursuant to this Agreement.

210. Customer has approval rights for certain staffing changes.

[Opt-in language: Same as the heading of this provision.] (a) As used in this clause, *designated provider staff member* refers to an employee of the provider, or of an affiliate of provider, who has been specifically designated to the customer by the provider as providing stated services pursuant to this Agreement. (b) The provider will see to it that no designated provider

staff member is removed from so providing the stated services unless at least one of the following is true: (1) The customer approves in writing, with approval not to be unreasonably withheld or delayed; (2) the employee's employment with the provider or its affiliate is being terminated; and/or (3) all of the following are true: (i) the employee's time is being billed to the customer, (ii) the provider or its affiliate is increasing the rate at which the employee's billing time is to be billed to customer (subject to any applicable restrictions on such increases imposed by this Agreement), and (iii) the customer elects not to pay the increased rate.

211. Provider will cooperate with the customer's own efforts.

[Opt-in language: Same as the heading of this provision.] (a) The provider will provide reasonable cooperation with the customer, at its request, if the customer elects to perform itself some or all of the services described in a statement of work. (b) For the avoidance of doubt, this section does not in itself require the provider to share its confidential information with the customer.

212. Provider will cooperate with other customer contractors.

(a) The provider will provide reasonable cooperation with other contractors of the customer, if so requested by the customer, in their provision of goods or services for the customer. (b) For the avoidance of doubt, this section does not in itself require the provider to share its confidential information with other contractors.

213. Customer may further develop deliverables.

[Opt-in language: Same as the heading of this provision.] (a) The customer has the right to modify or otherwise further develop any *deliverable*. (b) This right has the same scope, and is subject to the same terms and conditions as, the customer's right to utilize the deliverable. (c) The provider is not obligated to provide any support for any such further development except as expressly indicated otherwise.

214. Other contractors may further develop deliverables for the customer.

[Opt-in language: Same as the heading of this provision.] The customer has the right to engage third-party contractors to modify or otherwise further develop *deliverables* on the customer's behalf; this right (i) has the same scope, and is subject to the same terms and conditions as, the customer's own right to further develop deliverables, and (ii) is subject to any restrictions imposed by law, for example export-controls laws.

215. Further development by provider's competitors is restricted.

[Opt-in language: Same as the heading of this provision.] Without the provider's prior written consent, the customer may not engage any competitor of the provider to modify or otherwise further develop any *deliverable* that (i) is the subject of one or more unexpired copyrights or patent claims owned by the provider, or (ii) contains trade secrets of the provider.

216. Proprietary-rights requirements must be met in subcontractor agreements.

[Opt-in language: Same as the heading of this provision.] Provider will enter into written agreements with its subcontractors (if any) that are at least as protective of the proprietary rights of Customer as those of this Agreement.

217. All non-employees are subcontractors.

[Opt-in language: Same as the heading of this provision.] For the avoidance of doubt, any individual providing services on behalf of Provider pursuant to this Agreement who is not an employee of Provider is deemed a subcontractor for purposes of this section.

218. Indemnity for viruses, pollutants, etc.

[Opt-in language: Same as the heading of this provision.] Provider will indemnify Customer against any harm arising out of introduction of harmful agents into Customer's business environment(s), for ex-

ample pollutants and computer viruses, as a result of Provider's work.

219. Documentation of work-in-progress status upon transfer

[Opt-in language: Copy and paste the entire provision, editing as desired.] As part of any transfer of work-in-progress, the provider will make reasonable efforts (i) to provide a documentary 'snapshot' of the status of the work being transferred and (ii) otherwise to provide reasonable cooperation in an orderly transition and knowledge transfer.

220. Billing for transfer of work-in-progress

[Opt-in language: Same as the heading of this provision.] (a) IF: The customer requests a transfer of work-in-progress OTHER THAN in conjunction with termination of a statement of work for breach by the provider; THEN: The customer will pay the provider for the time of its personnel in effecting the transfer at 100% of the provider's regular rates for such personnel. (b) For the avoidance of doubt, subdivision (a) does not in itself obligate the provider to transfer work-in-progress upon such a (non-breach-related) request.

221. Provider will make reasonable efforts to maintain staffing stability

[Opt-in language: Same as the heading of this provision.] The provider will take the specified action to maintain staffing stability in its work pursuant to this Agreement.

222. Customer dissatisfaction with staff members

IF: The customer becomes dissatisfied with any employee or other personnel of the service provider engaged in work under this Agreement; THEN: (1) The customer may give written notice to the provider of such dissatisfaction, including the specific reasons for such dissatisfaction if any; IN WHICH CASE: (2) The provider will promptly make such efforts (compliant with law) as it reasonably deems appropriate to remedy such dissatisfaction.

223. Billing of staff turnover time

[Opt-in language: "The provider's staff turnover time will be billed to Customer at

X% of regular billing rates."] Only the time of the individual turning over his or her duties will be billed; the time of the individual's replacement will not be billed.

224. Working for Customer competitors

[Opt-in language: "Designated provider staff members will not do work for designated Customer competitors while, and for three months after, providing services for Customer."] (a) The purpose of this clause is to protect the customer's confidential information. It applies if the parties expressly agree in writing that one or more companies are designated as the customer's competitors (*designated customer competitors*) for purposes of restricting the assignments of one or more specific employees of the provider and/or its affiliates (*designated provider staff members*). (b) During the time that any designated provider staff member is assigned to work directly on providing services for the customer pursuant to this Agreement, and for the specified period thereafter (if any), the provider will not assign that staff member to work directly on any project intended specifically and exclusively for a designated customer competitor without the customer's prior written consent. (c) For the avoidance of doubt, any designated provider staff member may work on projects that are not intended specifically and exclusively for a designated customer competitor, including for example technology that is used or to be used on behalf of multiple clients.

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3. Notes

Notes for § 101 Statements of work

Why is this provision included? Both parties tend to like having a services agreement serve as a master agreement. This allows the parties to agree to one or more specific statements of work (frequently abbreviated “SOW”) on a case by case basis, without having to negotiate legal T&Cs each time. In addition, Provider often wants it clear that its obligation to provide services will be only as stated in a statement of work.

Business discretion – subdivision (a): This phrase is intended to preclude an aggressive provider from claiming that the customer implicitly agreed to give the provider a certain amount of work. In one case, a provider made just such a claim in connection with an agreement between IBM and a subcontractor – the subcontractor asserted that IBM had agreed to give it \$3.6 million of work, but the court disagreed.¹

Definition – subdivision (b): The definition of “statement of work” is designed to accommodate situations in which the parties aren’t as punctilious about documenting their intentions as the lawyers might like: If it’s **clear** from emails, etc., that the parties agreed that Provider will do X, then this provision allows that agreement to be enforced. **ALERT:** Sometimes the parties’ lawyers might not review a statement of work as carefully as they do the body of the contract. Even so, a SOW can easily contain significant, legally-binding obligations. **Comment:** Drafters usually prefer strongly that contracts be self-contained (and often include an **entire-agreement clause** to make sure of it), but in this case referring to extrinsic written evidence seems likely to be a worthwhile trade-off for convenience in getting business done.

Change orders – subdivision (d): Both parties often want this kind of provision: • The provider wants to prevent the customer from claiming that the provider orally agreed to do more work. • The customer wants to prevent the provider from claiming that the customer orally agreed to pay for work the customer didn’t approve.

¹ *Business Sys. Engineering v. IBM Corp.*, No. 08-1081, available at <http://goo.gl/LQB1> (7th Cir. Nov. 10, 2008) (affirming summary judgment in favor of IBM).

Notes for § 102 Third-party approvals

Why is this provision included? It’s in both parties’ interests to establish a clear dividing line of responsibility for obtaining third-party approvals.

Comment: Identifying needed approvals may be a non-trivial task.

Required as a practical matter - subdivision (a): Consider a hypothetical situation in which it would be unwise to try to build a school in a certain area of Afghanistan without first getting approval from a local warlord or Taliban commander. The “as a practical matter” language in subdivision (a) is intended to cover that type of situation.

IP-license exception – subdivision (b): If a provider were being hired to provide extra bodies for a customer project, it probably wouldn’t make sense for the provider to be responsible for obtaining all required intellectual-property licenses. (In all likelihood the compensation probably wouldn’t be enough for the provider to take on that responsibility.) On the other hand, if the provider’s responsibility were such that it was warranting noninfringement in the Agreement, then of course that warranty would implicitly put the burden of obtaining IP licenses on provider.

ALERT – licensed work: When the third-party approval consists of a license or permit, California law holds some traps, and other states may have similar laws: • A contractor that undertakes work required to be done by a *licensed* contractor (for example, certain construction work), but that does not itself have the proper license(s) at all times while performing the work, may forfeit its right to be paid for *any* of the work.² Moreover, under a 2002 ‘disgorgement’ amendment to the California statute, such a contractor might have to repay any payments it did receive for the work.³

² See, e.g., *Great West Contractors, Inc., v. WSS Indus. Constr., Inc.*, 162 Cal.App. 4th 581, 76 Cal.Rptr.3d 8, No. B191662, available at <http://goo.gl/xODZ> (Cal. App. Apr. 28, 2008) (reversing \$220,000-plus judgment in favor of subcontractor, on grounds that subcontractor had not obtained the required license when it did preliminary work).

³ See generally Kyle A. Ostergard, *California Contractors Beware: You Must Be Properly Licensed at All Times!*, available at <http://goo.gl/TQiU>, for more analysis and cautions.

Notes for § 103 Performance standard

Why is this included? Applicable law will often impose an implied warranty of workmanlike performance. This provision makes that warranty explicit (as is typically done in services agreements). ¶ The definition of “workmanlike” here is my own coinage; it draws on concepts in various definitions I found on-line.

Alternatives: In some situations, customers might want to demand a tougher standard of performance – for example, “the highest professional standards,” whatever that means. (That could lead to a price increase, however, because providers are likely to be reluctant to have their work subjected to hindsight second-guessing without being compensated for the increased economic risk.)

Notes for § 104 Compliance with law

Why is this provision included? Customers often like to have written assurance (and of course whatever political- and PR cover that the assurance might provide) that their providers will comply with law.

Notes for § 105 Pollutants, computer viruses, etc.

Why is this provision included? A customer likely would, quite reasonably, desire that the provider not contaminate the customer’s premises, computer network, etc. **Should I object?** A provider might prefer a looser standard, e.g., *reasonable measures* instead of prudent measures, but it might be hard for the provider to convince its customer that it should not be held to a “prudence” standard.

Notes for § 106 Customer’s right to utilize deliverables

Should I ask for this? Customer will almost certainly want to be sure it has the right to use whatever work product Provider delivers to it. **Should I object?** In most circumstances this provision shouldn’t be objectionable to providers.

Comment: Customers sometimes demand *all* rights in deliverables, including ownership rights, but very often don’t need them. Granted, there are circumstances in which a customer might legitimately want to own all rights in anything and everything a provider happens to create. In my experience, though, very seldom do customers really need total ownership

of deliverables. They tend to ask for it mainly by reflex, even though it often makes more business sense for the provider to retain those rights.

Notes for § 107 Provider's ownership

See the commentary to section [106 above](#).

Notes for § 108 Compensation for services

Why is this provision included? Customers often want provisions like this to reduce the chances of being surprised by unexpected charges.

What if it were left out? That might depend on local law – the provider could try to argue that the parties implicitly agreed to pay the provider's standard billing rates, or that the provider was entitled to those rates on a *quantum-meruit* theory.

Billing for travel time – subdivision (b): Providers often reason that, when their personnel are traveling for a customer project, they are not fully available for other work, so the customer should pay for that unavoidable opportunity cost. ¶ Customers, in contrast, don't like paying for travel time; they reason that travel time represents an opportunity cost that the provider itself should absorb — *especially* if the traveler is able to do other work en route.

Notes for § 109 Staffing of provider's work

Why is this provision included? Customers sometimes demand the right to *veto* proposed staffing changes. Often, however, all the customer really wants is to be *consulted* about changes in its project staffing and other significant issues, which in many cases should not be especially controversial.

Provider's final authority and responsibility – subdivision (b): Some customers like to include the "responsibility" language, as potential protection against later claims that the customer, not the provider, was the "employer" of staff members.

Notes for § 110 Transfer of work-in-progress upon termination for breach

Should I ask for this? Customer will usually want the ability to "pull the plug" on a project and either complete the work itself or send it

to another contractor to be finished up.

Should I object? It shouldn't be.

Comment: If a transfer of work-in-progress is requested, the relationship between Provider and Customer is likely to be less than fully amicable. Two crucial questions to be considered in any transfer are: (1) Exactly how much effort is Provider expected to put in, given that the work is being taken away; and (2) how, if at all, will Provider be compensated for that effort, given that the customer might be taking the work away for good reason.

ALERT: Customer could want Provider to transfer work-in-progress directly to another provider, which could raise issues if the other provider is a competitor of Provider.

Notes for § 201 Electronic signatures are permitted.

Further reading: See generally the [Wikipedia article](#) about the enforceability of electronic signatures.

Notes for § 202 All necessary tasks are implied.

Should I ask for this? Customers may want this provision, mainly for comforting reassurance. **Should I object?** Possibly – providers might be concerned about the potential for expensive "scope creep" occurring in the guise of "implicitly require[d]."

Comment: I used to think that a provision like this could lead to disputes about the scope of the work. I've since tentatively concluded that, if such disputes are going to happen, it won't really matter much whether or not this provision is in the contract.

Notes for § 203 Each statement of work is a separate contract.

Should I ask for this? Provider may want this provision to negate cross-default rights. If the provider were to totally bomb out on SOW #1, but it did OK on SOW #2, it might not want the customer to be able to terminate both.

Should I object? On the other hand, if the provider did totally bomb out on SOW #1, then the customer might want the right to wash its hands of the provider entirely by terminating all SOWs, not just the problematic one.

Notes for § 204 Oral requests may require a written change order.

Should I ask for this? Provider may want this provision, mainly for its own comfort. **Should I object?** A customer that objected to this provision would probably cause the provider, rightly, to wonder whether the customer would be a "problem."

Notes for § 205 Customer assumes responsibility for disagreements about required third-party approvals.

Should I ask for this? If a provider senses third-party trouble ahead — for example an infringement claim, a governmental action, etc. — but the customer wants to proceed anyway, then the provider may want the right to opt out, plus an indemnity if it decides to go along with the customer's wishes. **Should I object?** The provision makes sense from both a legal- and practical perspective, but the provider may want to be tactful in asking for it.

Comment: The parties might want to war-game this possibility before contract signing.

Comment: The defense- and indemnity requirement of this section might be unenforceable if, say, criminal behavior is involved.

Notes for § 206 Rights in deliverables are conditioned on payment.

Should I ask for this? A provider could ask for this provision so that it will have more leverage in case the customer doesn't pay its bills. **Should I object?** Quite possibly, especially if the deliverables will be copyrightable or patentable. **ALERT:** In that case, the provider could say something like this: "Mr. Customer, you didn't pay our bills on time, therefore you had no right to use the software we developed for you, therefore you're a copyright infringer, *therefore you owe us your direct- and indirect profits arising from your use of the software.*" in that take the position that the provider has an alternative remedy, namely suing for payment, and therefore does not need to have the right to hold hostage the customer's rights in the deliverables. **Comment:**

Notes for § 207 Service-bureau use of deliverables requires provider's approval.

Should I ask for this? This provision seems to have application mainly when the customer's service-bureau use of deliverables (e.g., soft-

ware) could compete with the provider's own business. The provider might want to license such use separately, for example on a revenue-sharing basis. **Should I object?** Possibly – the provider and the customer should make sure they are in agreement about the scope of the customer's use rights.

Notes for § 208 Customer has certain rights to assign its rights in deliverables.

Should I ask for this? Under applicable law, a customer technically might not have the right to customer might want this for deliverables that are important to its business.

Notes for § 209 Reasonable staffing-stability efforts are required.

This provision could be burdensome on Provider. Moreover, the provision might not even be needed if smooth completion of Provider's obligations will not depend on its keeping key people in place.

Notes for § 210 Customer has approval rights for certain staffing changes.

Should I ask for this? Customers will sometimes ask for a provision like this in their services contracts because they want to minimize the impact of provider staffing changes.

Should I object? Providers might not be so eager to agree to this provision, because it can reduce their management flexibility.

Comment: In lieu of this provision, consider the [consultation provision](#) immediately above.

Notes for § 211 Provider will cooperate with customer's own efforts.

Should I ask for this? Customers might want this provision to give them flexibility to take over portions of the work. **Should I object?** Possibly – if the customer has the right to step in and do things itself, that could lead to finger-pointing about who screwed things up.

Comment: Note that this provision does not say anything about price breaks or refunds if the customer decides to take over part of a project. If the customer ever feels the need to do so, it's probably safe to assume a discussion of those subjects will be forthcoming.

Notes for § 212 Provider will cooperate with other customer contractors.

Should I ask for this? Customers might want this provision for comfort. **Should I object?** Possibly – it has the potential to cause disputes about the scope of the provider's obligations under the statement of work; it could also lead to finger-pointing if things get messed up.

Notes for § 213 Customer may further develop deliverables.

Should I ask for this? For obvious reasons, a customer might want to be able to tweak or otherwise improve a deliverable, or even to redo the deliverable in its entirety. **Should I object?** A provider might be concerned (1) that the customer could learn too much about the provider's trade secrets and confidential information, and (2) that the customer might later claim that Provider was implicitly obligated to support Customer's additional-development efforts. (The second sentence should take care of the latter concern.)

Notes for § 214 Other contractors may further develop deliverables for the customer.

Should I ask for this? A customer may well want the right to "hire out" further development of deliverables, especially if the customer does not have, or does not want to use, its own internal resources for that purpose.

Should I object? A provider might object to a customer's hiring one of its competitors to do additional development, because it might expose the competitor to the provider's trade secrets or confidential information. If that is a concern, [section 213](#) can address the issue.

Notes for § 215 Further development by provider's competitors is restricted.

Should I ask for this? Provider might want this clause to prevent its competitors from getting access to inner workings of Provider's deliverables. **Should I object?** Customer might not want to have its hands tied in this way – especially if there's nothing special about a deliverable.

Notes for § 216 Proprietary-rights requirements must be met in subcontractor agreements.

Notes for § 217 All non-employees are subcontractors.

CAUTION: Conceivably this provision could be problematic for a provider that uses independent contractors on a long-term basis, because it would impose specific subcontracting requirements on those relationships.

Notes for § 218 Indemnity for viruses, pollutants, etc.

Should I ask for this? A customer might want this provision as a tougher obligation than just the prudent-measures provision of [section 202](#). In effect, this provision would require Provider to insure Customer against any harm arising from harmful agents introduced as a result of Provider's work. In essence, this would impose strict liability on Provider in respect of harmful agents. **Should I object?** Provider would very likely object to this indemnity obligation because of its strict liability; it might well demand a price increase as compensation for taking on this "insurance" risk.

Notes for § 219 Documentation of work-in-progress status upon transfer

Should I ask for this? Customer may well want Provider to be obligated to document the status of work-in-progress – otherwise, Customer or its substitute contractor might have to spend an inordinate amount of time restarting the work. **Should I object?** Quite possibly – Provider might not want to commit to this kind of effort without being paid (which, happily, can be done by including [section 603](#)).

Notes for § 220 Billing for transfer of work-in-progress

Should I ask for this? Provider will want to be paid for transferring its work-in-progress to Customer, especially if (i) Customer wants a lot of knowledge transfer, and/or (ii) there's a disagreement about whether Provider is in breach. **Should I object?** Possibly – in case of an alleged breach by Provider, Customer's attitude might be "hell, no, I'm not paying them another [expletive] nickel." But it may be in Customer's best interest to give Provider a cash incentive. (On the other hand, if Provider is in breach, it might be well advised to coop-

erate in a transfer of work-in-progress without being paid.)

Notes for § 221 Provider will make reasonable efforts to maintain staffing stability

Should I ask for this? Customers sometimes ask for provisions like this, because high staff turnover in a project can cause problems, delays, and cost increases. **Should I object?** This provision could be burdensome on the provider. Moreover, the provision might not even be needed if smooth completion of provider's obligations will not depend on its keeping key people in place.

Notes for § 222 Customer dissatisfaction with staff members

* The "such efforts " phrase should make it clear that Provider has final authority over specific steps to cure Customer's dissatisfaction . (Customer likely would not **want** much authority over Provider's staffing — that might increase the odds that Customer could be held to be an inadvertent "employer" of Provider's employees and contractors.)

Notes for § 223 Billing of staff turnover time

Notes for § 224 Working for Customer competitors

WHO WANTS THIS, AND WHY:

CONTENTIOUS? Quite possibly. For obvious reasons, providers should be careful about agreeing to this clause.

COMMENT: This provision has been drafted to attempt to balance the interests of Customer and Provider.

Software Development

**EXCEPT TO THE EXTENT, IF ANY, THAT
THIS AGREEMENT STATES OTHERWISE:**

1. Standard provisions

101. Open-source software and other restricted third-party materials

(a) Provider will not include *restricted third-party materials*, defined below, in deliverables without Customer's prior approval. Provider **need not** obtain such approval for any particular such materials (that is, blanket approval is sufficient).

(b) The term *restricted third-party materials* refers to any materials that are subject to a license from a third party restricting or imposing conditions on Customer's use of the deliverables. (1) Such restrictions or conditions on use include, for example, restrictions or conditions on: making copies of or manufacturing the materials; using the materials; selling, offering for sale, or otherwise distributing the materials; creating derivative works based on the materials; and publicly-performing or -displaying the materials. (2) *Restricted third-party materials* include, for example, open-source code released under one or another license such as, for example, the General Public License (GPL), the BSD license, the MIT license, and the like.

(c) Provider will seasonably advise Customer of any restricted third-party materials included in deliverables. For the avoidance of doubt, the previous sentence does not in itself authorize Provider to include any such materials in any deliverable.

[MORE TO COME]

2. Available opt-in provisions

The provisions below apply only if so specified in this Agreement, for example by using the suggested opt-in language.

[TO COME]

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